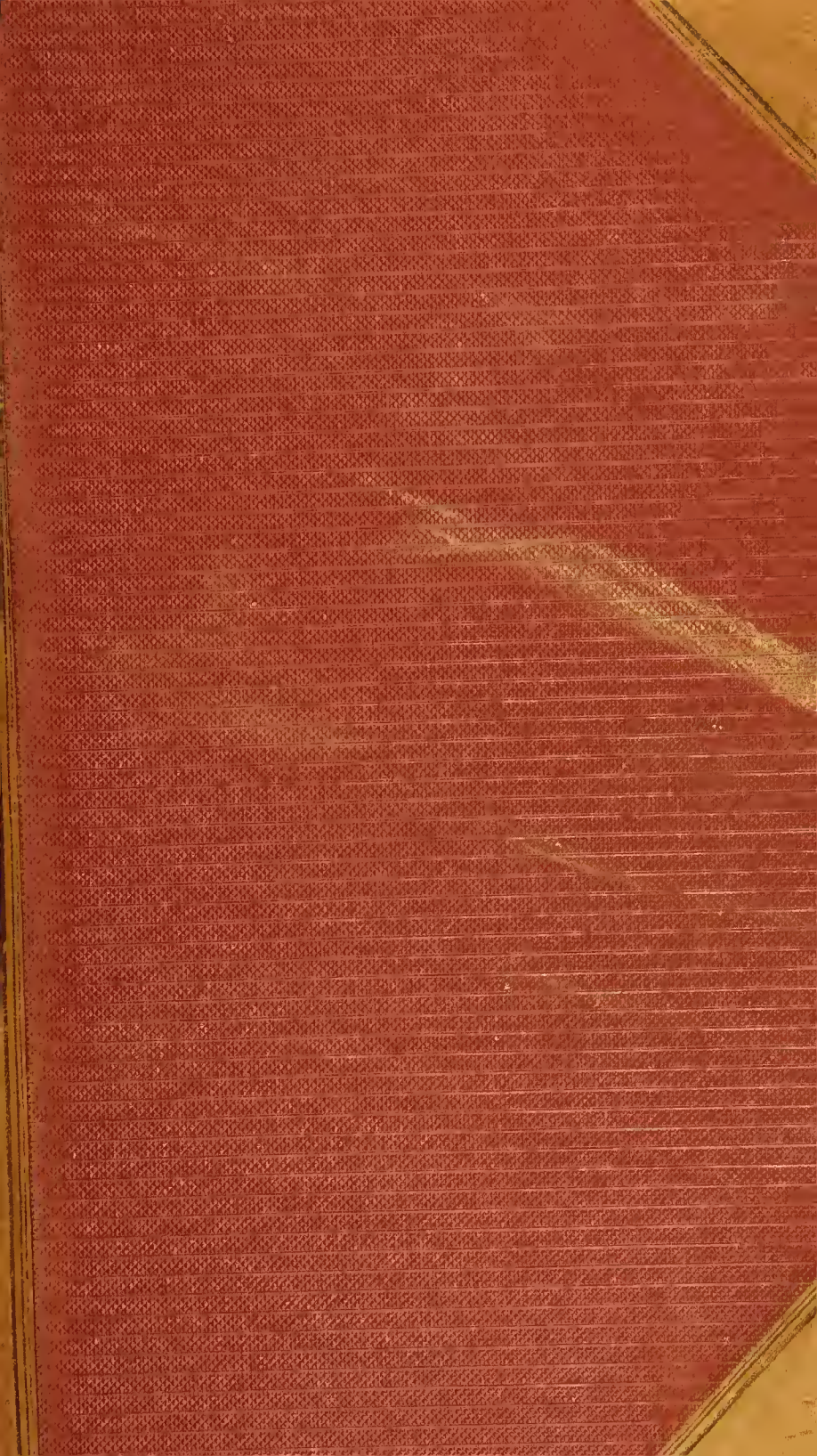
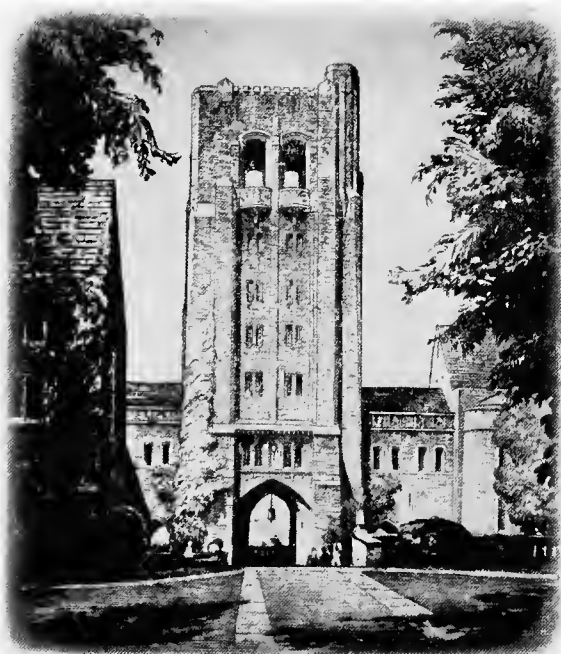




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REPORTS OF CASES

HEARD AND DETERMINED

IN

W. H. Jones 69

**The Supreme Court of Judicature
at Fort William in Bengal,**

FROM

JANUARY, 1847, TO DECEMBER, 1848,

BOTH INCLUSIVE;

WITH

*TABLES OF THE CASES, TITLES, AND PRINCIPAL MATTERS,
AND AN APPENDIX OF CASES DECIDED ON APPEAL.*

By GEORGE TAYLOR, Esq.

BARRISTER AT LAW, OF THE INNER TEMPLE.

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JUDGES

OF THE

SUPREME COURT OF JUDICATURE
AT FORT WILLIAM IN BENGAL,

DURING THE PERIOD COMPRISED IN THIS VOLUME

Sir LAWRENCE PEEL, Knt. Chief Justice.
Sir JOHN PETER GRANT, Knt.
Sir HENRY WILMOT SETON, Knt.
Sir ARTHUR WILLIAM BULLER, Knt.
Sir JAMES WILLIAM COLVILE, Knt.

ADVOCATE-GENERAL.
J. W. COLVILE, Esq.

STANDING-COUNSEL.
C. R. PRINSEP, Esq.

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REPORTS OF CASES

HEARD AND DETERMINED

IN

The Supreme Court of Judicature at Fort William in Bengal.

Plea Side.

JOMAU RAM and another *v.* HOORMASJEE BAWUNJEE
MODEE.

1847.

*Feb. 1st.
Monday.*

*Wager—
Illegality of*

ASSUMPSIT on an Opium contract.

The first count stated that before and after the making of the contract and promises therein mentioned, certain Public sales of opium were held periodically in Calcutta, by the East India Company, and one of such Public sales of Opium, commonly called and known as the 5th Public sale of 1846, was to take place, to wit on the 29th day of June, 1846. That it was and is the custom at the said Public sales, to put up and sell the said Opium to the public in lots, consisting of five chests; and that in consideration the plaintiffs, at the request of the defendant, had bargained to sell to the defendant, one lot of five chests of Opium of the 5th sale of 1846, at Co.'s Rs. 1,344 as the average price of the said sale, the defendant then agreed to purchase the said lot from the

A wager on the future prices of Opium at the E. I. Company's Public Sales, is illegal, on the ground that such a wager creates in one of the contracting parties, an interest, tending to influence that party to endeavour to diminish the amount of revenue payable to the Company on the sale of that commodity.

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plaintiffs, and to receive the profit thereon from the plaintiffs, if the average should exceed the said sum of Co.'s Rs. 1,344; and to pay the plaintiffs the loss thereon, if the average should fall below that sum. That the plaintiffs were ready to abide by the contract on their part, whereof the defendant always had notice. That the 5th Public sale took place on the 29th June, 1846, and that the average thereof was below the sum of Co.'s Rs. 1,344, to wit Co.'s Rs. 1,105-13; and that the loss or difference thereon amounted to wit to Co.'s Rs. 1,190, which last mentioned sum the defendant became liable to pay on request to the plaintiffs, according to the tenor and effect of his said promise.

The second count stated an agreement or contract between the plaintiffs and the defendant, that if the average of the said 5th Public sale of Opium of the year 1846, should exceed Co.'s Rs. 1,344, the defendant should receive the difference from the plaintiffs, and that if the average should fall below that sum, the defendant should pay the plaintiffs the difference, and thereupon, in consideration of the premises, and that the plaintiffs had then promised the defendant to pay him the said difference in the former event, the defendant then promised to pay the plaintiffs the difference in the latter event. That the said 5th Public sale took place on the 29th June, and that the average was below the said sum of Co.'s Rs. 1,344 to wit Co.'s Rs. 1,105-13, and that the difference thereon amounted to wit to Co.'s Rs. 1,190 which the defendant then became liable to pay the plaintiffs on request, according to the term and effect of his said last mentioned promise.

The pleas were—First, the general issue. Secondly, to the first count. Traverse, that the average of the 5th Public sale was below Co.'s Rs. 1,344.

Thirdly. That the contract was rescinded before breach by mutual consent.

Fourthly. To the second count. Same as second plea to the first count.

At the trial, which took place in December last, one contract only of the two stated in the plaint, was proved. It was objected, for the defence, that the contracts declared on could not be enforced by law, on the ground of their being contrary to public policy, inasmuch as they were gambling transactions, or mere bargains for the difference between the average and contract price, or between the contract price and the average, as the case might be. Evidence also was given in support of the third plea, to the effect that the plaintiffs, having become indebted to the defendant on a contract of a similar nature at the 4th sale, and being unable to pay, it had been agreed on between them, that the Opium chitties should be mutually returned to each other, and that each party should be thenceforth absolved from their respective engagements.

The Court (a) held that the third plea was not sufficiently made out, and as one contract only of the two declared on, had been proved, directed the plaintiffs to make their election. The plaintiffs having elected to take a verdict on the second count, the verdict was so entered, subject to leave reserved to the learned Counsel for the defendant to move in arrest of judgment.

Mr. *Prinsep* having, on a subsequent day, obtained a *rule nisi* accordingly :

Mr. *Dickens* and Mr. *Ritchie* showed cause. There is nothing to show, that the wager stated and proved in this case is an illegal one : for neither on the pleadings

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HOORMASJEE
BAWUNJEE
MODEE.

(a) Sir L. Peel, C. J., Mr. J. Grant and Mr. J. Seton.

January 22nd.

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Plea Side.

JOMAU RAM
".
HOORMANJEE
BAWUNJEE
MODEE.

nor by the evidence on the defendant's part is the question of illegality raised. Wagers, generally speaking, are not prohibited by the Common Law, however trivial or indifferent their subject matter may be, and although the Courts have occasionally reprehended these contracts and expressed regret that they should have been sanctioned, still it has been established by a long train of decisions, that, with certain exceptions, wagers are valid, and can be enforced by the Law of England (a). In order to render any particular wager illegal, it is necessary to show, either—First, that the tendency of it is injurious to public policy, morality or decency, or in some other respect to the detriment of the *public*; 2dly. That such wager affects the interest, feelings, or character of a *third person*:—or lastly, that it is prohibited by some positive statute. The burden is thrown upon the defendant, of showing that this particular wager falls within one of the excepted cases. It is clear it does not affect the interest, or the feelings, or character of third parties, as instanced in the case of *Decosta v. Jones* (b) which was a wager as to the sex of the Che-

(a) The French law is to the a wager. Games proper in the following effect:—" *La loi n'accorde aucune action pour une dette de jeu ou pour le paiement d'une pari. Les jeux propres à exercer au fait des armes, les courses de chariot, le jeu de paume et autres jeux de même nature qui tiennent à l'adresse et à l'exercice du corps, sont exceptées de la disposition précédente, né amoins le tribunal peut rejeter le demande, quand la somme lui paraît excessive.*"—Code Civil bk. 3, tit. 12, c. 1. "The law does not allow an action for a debt of play, or for the payment of

a wager. Games proper in the exercise of feats of arms, foot races, horse or chariot races, tennis, and other sports of the same nature, which require address and agility of body, are excepted from the preceding ordinance. Nevertheless the Court may reject the demand when the sum appears to be excessive." And by the *French* law, the sum cannot in any case be recovered back if voluntarily paid, unless there was fraud. See also Chitty Jun: on Contracts, p. 495.

(b) Cowper, 729.

valier D'Eon, and which was considered *per se* illegal: nor does there exist any prohibitory statute. The only ground, then, on which the defendant can for a moment rest the illegality, is that of its being against *public policy or morality*. But the case under discussion does not seem to come within the purview of any of those, which have established the illegality of wagers on that ground. Wagers on the question of war or peace, as in *Busk v. Walsh*; (a)—or on the life of a Foreign Potentate at war with this country, as in *Gilbert v. Sykes* (b)—in restraint of marriage, as in *Hartley v. Price* (c)—as to the probability of acquittal or conviction of a prisoner on a criminal charge, as in *Evans v. Jones*, (d);—or on the event of an election of a member to serve in Parliament as in *Allen v. Hearn* (e) are, no doubt, all unlawful, because they are contrary to sound policy, or have a tendency pernicious to public morality.

There are several authorities which show that wagers have been supported in a Court of law, for instance in *Good v. Elliott*, (f) where the subject of the wager was whether one S. T. had or had not, before a certain day, bought a wagon belonging to D. C.; and in *Jones v. Randall* (g) it was held that an action lay to recover money upon a wager, whether a decree of the Court of Chancery would be reversed or not on appeal to the House of Lords—there being no fraud or turpis causa in the contract. So here, nothing appears upon the record or the evidence, exhibiting fraud or other illegal or immoral motive in the contracting parties; the bet depending simply upon the fulfillment on non-fulfillment of

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MODEE.

(a) 4 Taunt. 290

(e) 1 T. Rep. 56.

(b) 16 East, 151.

(f) 3 Term Rep. 693.

(c) 10 East, 22.

(g) Cowp. 37.

(d) 5 Mees & W. 80; 8 Law. J.

(N. S.) Exch. 173.

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particular casualties. It may not unreasonably be contended that the *tendency*, operating on the minds of the parties wagering in *Jones v. Randall* would be equally as great, to induce them to procure evidence, or exert their influence in procuring a decree favorable to their own view, and to the manifest detriment of one or other of the litigating parties, as in the present instance, to encrease or depreciate prices of Opium at the Sales, and yet in that case the wager, as before stated, was held good. In the present instance, however, the argument for the defendant rests upon the assumption, that such wagers are prejudicial to the public revenue. An assumption which (it is contended) is totally unfounded. For, conceding that they relate to a branch of the public revenue, it is difficult to make out that they either tend, or do operate in fact to the prejudice of that revenue—such a result can only occur in one of two ways; either, by causing inconvenient *disclosures* with respect to the public revenue; or by depressing the amount of revenue, and so prejudicially affecting it. The former question was raised in the case of *Atherfold v. Beard* (a) in which the wager on the amount of Hop Duties, was held illegal. But that decision proceeded on the ground, that the books of the Officers of the Customs were the best evidence in proof of the wager's having been won; and these could not be produced without inconvenient exposure. No such reason can apply to the present case; as here the subject matter of the wager is not as to the *amount* of revenue, but as to the average price of sale at a *public Auction*, to which all the world has access, and where concealment is never attempted or resorted to, and where, if resorted to, it would in reality be useless and inoperative. Then, as to the question whether the amount of revenue is affected prejudicially by such a wager.—In the absence of

(a) 2 Term Rep. 600.

evidence to that effect, it is impossible to contend that such is their tendency ; the inference would be the other way, for their tendency is rather to increase than depress the price of Opium, and consequently, in a corresponding ratio, the amount of revenue : in that view the influence they produce is beneficial to the State. If it be urged that the tendency is to cause a fluctuation in the amount of revenue—such a consequence, in the first place, can scarcely be said to be prejudicial ; and secondly, some proof should be adduced in support of the fact ; because, for all that appears upon the face of these wagers, their tendency may be equally strong to *steady* the prices. Conceding, that one party acquires by the contract a possible interest to depreciate the prices ; still, on that ground solely, these wagers can scarcely be held illegal : it ought further to be shown that one of the parties contracting possessed the *power*, as well as the interest or intention, to depreciate the prices at the sale ; here the party desirous of lowering the prices has no such power, and even if he had, the other party, who has the power as well as an interest to encrease the prices, by bidding up at the sale, would (as might reasonably be expected) for his own protection and advantage, invariably exercise that power, and defeat the bare interest of his competitor. Such a bare interest to depress prices is more than counterbalanced ; it is in fact rendered nugatory, by the interest and power combined to raise them. The latter certainly cannot be objected to as prejudicial to the revenue. If then the revenue be not affected by such a wager, it is clear, no objection whatever can be raised to its validity, for then it amounts to nothing more than a wager on the future price of goods. A contract of this description was held good in the case of *Morgan v. Pebrer* (a)

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(a) 4 Scott, 233 ; 6 Law, J. (N. S.) C. P. 75, & 3 Bing. N. C. 457.

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where also it was considered that such a wager did not necessarily create a tendency to injure third parties : so here—it does not seem necessarily to follow that a wager on the future price of Opium should injure either third parties (namely the intended purchasers at the Public sale) or consequentially, or otherwise tend to depreciate the revenue chargeable in respect of that commodity so sold. Nor is the absence of interest of both, or one of the parties in the goods, of any consequence, for in *Hibblewhite v. McMorine* (a) (overruling the dictum of Lord Tenterden in *Bryan v. Lewis*, (b) as well as that learned Judge's judgment in *Lorymer v. Smith* (c) to the contrary) a contract for the sale of goods to be delivered at a future day was upheld, although the vendor neither had the goods nor had entered into any contract to buy them, nor had any reasonable expectation of being possessed of them, otherwise than by purchasing after the contract. So also wagers on the price of Foreign Stocks have been supported as in the case cited of *Morgan v. Pebrer*, as also in *Wells v. Porter* (d), *Elmsworth v. Cole* (e), and *Eltham v. Kingsman* (f). The principle was carried further in *Thornton v. Thackeray* (g) where a wager as to the circumstances and solvency of a third person, was considered so far objectionable, that the Judge might postpone the trial, upon the application of the third party, whose interest might be affected by the enquiry. But if the cause was tried and a verdict recovered by the plaintiff, it was held that neither a writ of error could be brought, nor the judgment arrested : upon the ground:—that such

(a) 5 M. & W. 462 ; 8. Law. J. 722, 732 ; & 5 Law, J. (N. S.) (N. S.) Exch. 271. C. P. 255.

(b) 1 Ry. & Mood. 386.

(e) 2 Mees & W. 31 ; 6 Law,

(c) 1 B. & C. 2 ; 1 Law, J. J. (N. S.) Exch. 50.

K. B. 7.

(f) 1 B. & Ald. 683.

(d) 3 Scott. 141 ; 2 Bing. N. C.

(g) 2 Y. & Jer. 156.

a wager was *not necessarily* illegal. Lastly, the objection in its present form, namely—in arrest of judgment, cannot prevail: unless the contract, as stated in the plaint itself, is necessarily illegal. It is not, therefore, sufficient to show, in order to arrest the judgment, that there are particular cases in which a wager analogous with that declared on, might have been held to have an effect adverse to public policy, or have been considered unlawful. If there be any possible case, in which such a contract might be lawful, the plaintiff is entitled to retain his verdict. Even, therefore, if in some extreme cases (which may be put) such wagers might have an effect prejudicial to the state (though it is difficult to conceive such a case arising *practically*) the defendant must remain liable on this record. Upon the whole it is submitted that this wager is not one, the fair consequence of which is detrimental either to the state or the public.

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Mr. *Prinsep*, contra.—This wager is clearly contrary to public policy: for, as the profit derivable from the public Opium sales is a recognized source of revenue, a wager on the results and chances of the sale, and of the fluctuation of the prices, is an injurious interference both with the interests of Government and of the public, which must tend either to diminish the revenue, or impose burdens on the public by unfair and illegal means. The amount of revenue realized from this source is necessarily regulated by the price of the Opium at the public sales; if the price of this commodity be enhanced or decreased by any undue means, of course the revenue must also be correspondingly affected. The conflicting interests, which the contracting parties respectively possess here, and which they have acquired by their own acts, must obviously cause, or at least have a tendency to cause, violent and unusual fluctuations in the price of

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Opium, for each party would naturally be influenced by motives to promote his own interest, and adopt measures for that purpose. Success, or even the attempt to succeed, would, on the one side, have the effect of increasing the amount of the reasonable and customary value of the article, whereby the public would be prejudiced, and an injury be inflicted on *bona fide* bidders; and, on the other hand, if a contrary result be produced, the revenue would become proportionably diminished. In either point of view, therefore, whether the interest possessed by the wagering parties, tends to increase or to diminish the price of this article, such interest creates a tendency in their minds to act in a manner injurious and opposed to sound public policy. This shows that the argument on the other side,—that one party only has the power of putting in force his interest, (and that beneficially to the revenue) by raising the prices, is of no real weight, for the very possession of that power, together with the manifest inclination to exercise it in order to promote the interest of the possessor, must operate prejudicially to the *public*; even if it do not in its results diminish the amount of revenue, or even tend to do so. This case comes precisely within the scope and authority of that of *Atherfold v. Beard* (a) and the principles there laid down are applicable here. That was a wager on the amount of hop duties, and was considered illegal as affecting the revenue. The wager in the present instance, it is true, is on the amount which the Opium may fetch at the sales, but then the duty is levied on that amount, and is therefore equally affected; for as the price is lessened or deteriorated, so in proportion, does the revenue suffer. Although it is difficult to say, in what precise manner an improper bias will be exercised for the purpose of carrying out the original design, or whether it

(a) Ante (p. 6, note, a.)

will eventually (an enquiry indeed wholly immaterial in considering this question) have any effect at all,—still the very tendency operating on the mind of one contractor is to interfere with the rights of the public (who ought to be protected not only against such an evil, but against the possibility of its occurrence,) and the bias on the mind of the other contractor is to interfere with the public revenue; and this tendency, whether existing in the minds of one or both, is a sufficient foundation for the illegality of such a wager.—*Evans v. Jones (a)*, *Shirley v. Sankey. (b)* And in *Allen v. Hearn (c)* Lord Mansfield said “a gaming contract ought not to be encouraged, if it has a dangerous *tendency*.” It is a matter of no moment to ascertain whether the result has or has not terminated prejudicially to the revenue or the public, for if a tendency to prejudice either the one or the other exists, the contract was illegal in its inception.

Mr. *Montrieu*, on the same side, contended further,—The contract declared on, is illegal, not only as directly and injuriously affecting the public revenue, but also as subversive of trading interests, and contrary to the commercial public policy of the Law.—The direct and necessary tendency,—the very object of the contract, is to give to one of the parties an interest to enhance, to the other an interest to depreciate, the price of a marketable commodity; neither party being, in fact, a trader, nor desiring to deal in or possess the commodity; and, therefore, not having any legal interest in the price. It is an illegal wager, because it causes fluctuation of prices in an illegal manner. Trade is specially the subject of protection by common and statute law; and Forestalling and Engrossing are common law offences,

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(a) Ante (p. 5, note, d.)

(b) 2 Bos. & P. 130.

(c) Ante (p. 5, note, e.)

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because they are endeavours to enhance unfairly the ordinary price of merchandise. (a) It cannot be denied that wagers of this character, if they do not come within the definition of Forestalling, as laid down by Hawkins, (b) have, at least, an obvious tendency to promote an indictable offence. "A contract is unlawful in a proper sense, if the object of it be, to induce the omission of something, the doing of which is a duty in the person with whom it is made:" and—"if it be to encourage unlawful acts or omissions." (c) The true principles of political economy, as applied to trade, must be considered part of the common law: the law recognises the source of Prices and their composition. Price is a result derived from the supply and demand, which, together, must determine the exchangeable worth of every marketable commodity. That this is an axiom of law is evident from the description and reasons of offences against trade. Price thus has a technical and legitimate meaning, and is an important element of trade—how then can a wager, which has a direct, if not a necessary tendency to vary the legal definition of price, and to affect it, independently of the cost of production, or of the wants of the community, be consistent with public policy, or be upheld by that law which is the guardian of trade, and which is pledged to prevent unfair, illegitimate interference with the public market? The Court has a right, indeed, cannot but presume the probability of evil effects resulting from this wager. There is no guarantee nor reason to suppose that such likely and obvious means to carry out the views of the parties to the contract will not be had recourse to. The case of *Morgan v. Pebrer* (d)

(a) 1. East, 142, 167. Bacon's
Ab. Forestalling.

(b) bk. 1, cap. 80.

(c) Powell on Contracts, vol.
1, p. 195, 196.

(d) Ante (p. 7, note, a.)

was an analogous contract with reference to Spanish Scrip; but this objection could not arise, as the subject of the wager there, was not an article of merchandise or trade. In *Hibblewhite v. MacMorine* (a) the objection was taken and overruled. That however was not the case of a wager upon prices, but a time bargain for sale and delivery of railway shares. If the Court should hold this case not to be directly governed by any precedent, (and upon the general objection such appears to be the case) they will nevertheless carry out the obvious principles and policy of the Law—For, as observed by Lord Abinger in *Muspratt v. Gregory*, (b) “Such is the nature of the law of *England*, and indeed of the law of all countries, that cases not provided for by the contemplation of the legislature, must, as they arise, be determined by the good sense of the judges, in analogy, as far as they can, to the former cases; and if that analogy is not perfect—if it cannot be traced satisfactorily to the understanding, so as to find some principle established by decided cases or rules, which may meet the immediate case, then they are at liberty to consider which is the safest course to adopt for the public convenience, and the judges must exercise their own limited judgment as to what may be most for the public convenience.” There can be no doubt whatever that these wagers have, in fact, a most mischievous tendency.

Cur. adv. vult.

SIR L. PEEL, C. J. delivered the judgment of the Court.

We consider this wager to be illegal, on the broad ground, that one of the wagering parties to it, acquires thereby an interest which has an *injurious tendency* towards the public. It concerns the public revenue—for

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(a) Ante (p. 8, note, a.)

(b) 1 Mees & Wel, 66.

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the wager creates an interest which might influence the party to *endeavour to diminish the amount of public revenue payable to the State*. The public revenue may in many conceivable cases be diminished innocently, and people in such cases may innocently endeavour to cause persons to abstain from attending the public sales of Opium. But a wager—that the public revenue, or a branch of it, shall not within a given time produce so much—gives to one of the contracting parties an interest to diminish it, which interest might lead him to the commission of an offence against the State to whose laws he is subject, and for whose service the revenue of the State must be presumed to be raised, to be applicable and to be applied. A wager on the average price of a particular Sale of Opium, though not a wager directly *on the amount of the collection*, is a wager on that, on which that amount directly depends. The illegality of wagers is in their *tendencies*, at least, when the subject matter of them is a matter of public interest. A reference to old cases is no safe guide. The modern decisions from *Dacosta v. Jones*, in the time of Lord Mansfield, downwards, furnish us with the principles on which the illegality of any wager must be established, and illustrate the application of those principles. The onus of establishing that it is illegal, lies on the party imputing illegality to the wager. This may be done by establishing its injurious tendency towards the public. That the illegality depends on *tendency* is established by many modern cases, for instance in *Allen v. Hearn*; in Lord Mansfield's Judgment, in *Atherford v. Beard*; in the Judgments of Mr. Justice Ashurst and of Lord Ellenborough in the case of *Gilbert v. Sykes*; where the latter defines it to be “a tendency to produce a public mischief or inconvenience;” and also in the cases of *Eltham v. Kingsman*, and *Evans v. Jones*. By tendencies is not meant that the certain and inevitable, still less that the probable consequence of wagers of the

class prohibited, would be the production of the anticipated evil: but if the wagering contract introduces an interest which *may* clash with public duty, it tends to the public detriment. In *Evans v. Jones*, Mr. Baron Maule says: "It is now too late to say, that no wager can be enforced by law: but I think it would have been better if they had been originally left to the decision of the Jockey Club. This wager is clearly objectionable, as the tendency of it is to prejudice the course of public justice; and whenever a wager has such a tendency, it is against public policy, and is, therefore, void." The mischiefs suggested by Mr. Baron Parke in that case, (which was a bet on the result of a pending criminal prosecution) of the suppression or fabrication of evidence, or of prejudicing the public mind on the case, are by no means necessary or even probable consequences of a small wager between unconcerned persons on the result of a pending criminal charge; and therefore, the learned Baron in using the word necessary as an adjunct to the term tendency, evidently means no more than the word tendency, without the adjunct in itself, imports. The evils suggested by Mr. Baron Parke are the suggestions of *criminal acts*, to which the encouragement of such wagers, by enabling a party to recover on them, *might lead*. Lord Abinger in the same case says: "here the party had acquired by the wager a direct interest in procuring the conviction of the prisoner, and although it is impossible to say in what precise manner an improper bias may be exerted, or whether it will have any effect or not, yet the very tendency of his mind to act in such a way as to prevent the course of justice, is a sufficient foundation for the illegality of such wagers." Now, the diminution of the public revenue must, *primâ facie*, at least, be assumed to be a public evil: it is not to be presumed to be more than adequate to the exigencies of the

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public service, and a party shall not be allowed to introduce (by his mere idle wagering contract alone) a bias on his mind, producing a direct interest in the diminution of the revenue, referrible only to such mere pecuniary motive, and which might induce him to offend against the law. To spread false rumours to prejudice the public revenue; to prevent or injure by illegal solicitations or means a public sale of the Opium; or otherwise to obstruct the Government in the collection of its revenue in this or any other branch,—these would all be offences against the law, with or without conspiracy or combination of numbers. It is obvious, however, that if such wagers as these prevailed many might become concerned in a combination to delay, obstruct, prejudice or prevent a sale, and so, the realization of revenue. It is no very improbable conjecture, that the interest created by these wagers might prompt persons to endeavour to prevent a sale, and that such endeavours might be successful; these supposed consequences are at least as probable and immediate as those suggested in the case of *Evans v. Jones*. As, therefore, we cannot distinguish the present case in principle from the last quoted: as it differs but in the nature of the public interest which the wager might affect, it appears to us that this wagering contract is illegal.

Judgment arrested.

NOTE.

RAMLALL THAKOORSYDASS AND OTHERS,

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This case came on upon demurrer to the plaint, containing counts on contracts, similar to those declared on in the principal case. Mr. *Crawford* in support of the demurrer.—Mr. *Herrick*, Mr. *Howard*, Mr. *Dickenson*, Mr. *Holland*, and Mr. *Wallace*, in support of the plaint.

The following cases, (as well as that of *Jomauram, &c. v. Hormasjee, &c.*) were cited *arguendo*.

Da Costa v. Jones, 4 Cowp. 729. *Eltham v. Kingsman*, 1 Barn. and Ald. 683. *Jones v. Randall*, Cowper, 37; *Henkin v. Guerres*, 12 East. 246; *Evans v. Jones*, 5 Mees. & W. 77; *Levi v. Levi*, 6 Car. & P. 239; *Morgan v. Pebrer*, 4 Scott. *Hibblewhite v. McMorine*, 5 M. & W. 462; *Good v. Elliot*, 3 T. R. 693; *Allen v. Hearn*, 1 T. R. 56; *Gilbert v. Sykes*, 16 East. 150; *Atherford v. Beard*, 2 T. R. 610; *Shirley v. Sankey*, 2 Bos. & P. 130; *Hartley v. Price*, 10 East. 22; *Wells v. Porter*, 3 Scott, 141; *Oakley v. Rigby*, 3 Scott 194. *Bryan v. Lewis*, Ry. & M. 386.

There being a difference of opinion, the learned Judges delivered their Judgments *seriatim*.

MR. JUSTICE *Perry*.—The broad question which has been argued in this case is, whether a time bargain in the nature of a wager on the future price of Opium at one of the Government public sales at Calcutta, is a valid contract according to the law of England.

A few facts not strictly contained within the record have been imported into the argument, but as they were of public notoriety, such as the sale being by public auction, and the proceeds being a branch of the Government revenue; the Court, with a view of saving expense, was not unwilling to hear them assumed as if apparent in the face of the pleadings.

Now the nature of the contract being such as I have stated, it is obviously a mere gambling transaction, and, as such, fraught with all the evil consequences to society which that vice engenders. But in considering the validity of a gambling contract in a legal point of view, all these evil consequences, as attached to gambling generally, must be kept out of sight; because the common law of England, unlike the Code Civil, and most other European codes, founded on the Roman law, allows gambling contracts to be sued upon, except in certain special cases, where considerations of a public nature, such as are sufficient to invalidate all contracts, intervene, or where the rights or interest of third parties would be injuriously brought into discussion. For although the British legislature by a statute passed two years ago, (8 and 9 Vict. c. 109,) has assimilated the law in England to the Civil law, by making all wagers and gambling contracts null and void; that statute has not interfered with the English common law prevailing in other parts of the British Empire.

It is, I think, to be deplored that the common law has taken this course, and I have always regretted that the fine juridical arguments

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which Mr. Justice Buller brought forward in *Good v. Elliot* against the validity of wagers generally, were not allowed to prevail, and that the Judges are compelled, as a general rule, to devote the public time, and to tend all the powerful machinery of Courts of Justice, to the enforcement of the contracts of mere gamblers.

Still, such is the law, and however much judges as grave moralists may be disposed to frown upon gambling, and to find astute reasons in each particular case for disallowing the contract under discussion, I think the mischief which is produced by the Court permitting to itself this large discretion, compounding thereby the provinces of legislation and judicature, and rendering it impossible for the profession or the public to predicate in any case what the law on the subject is, I say I think these consequences are so grave, that it is our bounden duty to follow out the law which has been laid down, into all its logical conclusions, and not to endeavour to give it the go by, by inventing subtle and artificial distinctions.

Accordingly, as the decisions in England have laid down most distinctly that time bargains, whether in the public stocks or in goods, are valid at common law, it appears to me that the Courts have no longer any discretion to exercise on the subject, but that they must humbly follow the current of authorities, and pronounce this time bargain in Opium to be valid.

This indeed has been the conclusion which this Court has arrived at, and acted upon, for some years past, and in the many Opium cases which have come before us, it has never been suggested that there was anything to distinguish a time bargain in that drug from the time bargains in other commodities which had been sanctioned by the Courts at Westminster Hall.

The decisions I refer to, however, have not made the same impression upon his Lordship here, nor as I understand upon the Supreme Court at Calcutta, which they have upon myself; it is therefore incumbent upon me, and indeed it is due to the public, who have been influenced by our previous decisions, to state my reasons why I think those decisions were sound, and ought now to be upheld.

It is conceded by those who maintain the invalidity of this contract, that a wager *per se* is legal, and that it lies upon the party who resists the enforcement of it to bring forward distinct legal grounds for its nullification. I have alluded briefly to the excepted cases wherein wagers are illegal. Statutory provisions, immorality, injury to third parties, and tendency to affect the public interests or public policy, comprize, I believe, the whole of the grounds on which the illegality can be based.

In the present case the illegality of this wager is rested on its alleged evil tendency as respects public policy. A direct motive, it is said, is given to the contracting parties, on the one hand, to lower the prices of Government Opium, and so to diminish the public revenue, on the other hand, unduly to enhance prices, and so to injure the consumer, by raising the fair market value of the commodity.

Now before examining this argument in detail, some general observations may be made, which seem to me to show that the inquiry ought not to be gone into at all.

It is obvious that a consideration of this argument necessitates an investigation of the various causes which influence prices. In order to ascertain what the tendency of speculations upon prices may be, an extensive knowledge is required of the doctrines relating to supply and demand, to monopoly and competition, besides a large induction from the facts connected with the particular commodity in question. I hold that these inquiries are wholly foreign to the province of a Court of Justice.

It is possible certainly that a Judge may be a great political economist, and a distinguished predecessor of ours happened to be one of the first of his day, but no one would think of deferring to the opinion of the Bench on a question of political economy any more than on a disputed point in geology or agricultural chemistry. The answer to arguments founded on this basis, therefore, is that these are not considerations for lawyers to entertain. (a)

Their province is to give effect to the rights and obligations which individuals create amongst one another by their private contracts and agreements. On broad legal principles, and as a general rule, individuals have a right to enter into whatever contracts they please, and it is the office of Courts of Justice to enforce fidelity to such engagements, except in certain specified cases, where the exceptions are as well known as the rule. The Legislature has often seen reason to interfere with such contracts whenever it finds, or considers, that the public interests are injured by any particular class of dealings, and full notice is given to the world of what the forbidden contracts are. But Judges have not the same materials before them as the Legislature for forming sound notions on public policy, and fortunately we have the light of experience to guide us in pointing out the extreme danger which is incurred, when Courts of law go out of their path, and found their decisions, not on solid juridical grounds, but on their own imper-

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(a) Chief Justice *Best* seems to have been of the same opinion. See his Judgment in *Richardson v. Mellish*, 9 B. Moore, at page 463.

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fect notions of what public policy requires. The common law can scarcely boast of two abler men within its own particular sphere, than Lords Kenyon and Tenterden, and yet when they assumed to apply their notions of public policy to the contracts between man and man, they laid down doctrines that made the whole commercial world tremble, and which the veriest tyro in political science would now repudiate. In *Rex. v. Waddington*, (1st East,) Lord Kenyon sentenced a respectable merchant to four months imprisonment, and a thousand pounds fine, for certain mercantile operations, which are carried on every day by every individual in commerce, and which it is indeed the peculiar and beneficial province of a merchant to undertake. Mr. Waddington, it seems, was an extensive merchant, and having a quantity of hops on hand, he considered, (on what appears to have been sound mercantile reasoning,) that the prices were ruinously low; he calculated the amount of stock in the hands of the brewers with the forthcoming supply, and came to the conclusion that the prices must speedily rise, and that undue causes had depressed them. He acted upon his convictions, stated openly *in the market his reasons*, and bought hops largely, with the avowed object of raising the market price. For these acts he received the punishment I have before mentioned, and Lord Kenyon laid down the following doctrine; "It has been said, that if practises such as these with which this defendant stands charged are to be deemed criminal and punishable, the metropolis would be starved, as it could not be supplied by any other means. I by no means subscribe to that position. I know not whether it is supplied from day to day, from week to week, or how otherwise; but this is to me most evident, that in whatever manner the supply is made, if a number of rich persons are to buy up the whole, or a considerable part of the produce, from whence such supply is derived, in order to make their own private and exorbitant advantage of it to the public detriment, it will be found to be an evil of the greatest magnitude, and I am warranted in saying that *it is a most heinous offence against religion and morality, and against the established law of the country.*"

Here then is a doctrine which would bring within the pale of the criminal law nearly every merchant in the realm; yet Lord Kenyon tells us in the same Judgment that he had read through Adam Smith's work, in order to form sound views upon the subject! Lord Tenterden went equally far wrong in a case to be mentioned presently, by his speculations, founded on his own particular views of public policy. When therefore we have such flagrant examples as these before our eyes, I accede most cordially to the observations urged at the bar against the impropriety of Courts of law founding their judgments on

considerations of public policy, upon which the Legislature has not thought fit to pronounce, and I had considered the strong observations made on this point by such distinguished living Judges as Barons Parke, Alderson, and Maule in a case, (*Hibblewhite v. McMorine*), very parallel to the present, as having completely disposed of any argument to be raised on this score.

This argument, however, has been strongly urged at the bar, and the present case it would seem is to be disposed of upon it. It behoves me therefore to consider it somewhat closely.

These time bargains, it is said, are contrary to public policy, because they have a tendency to stimulate the contracting parties to commit offences with regard to prices. The party who has an interest in a low price ruling, has a direct motive supplied him to prevent persons, by any illegal means he may devise, from becoming purchasers; the other party has a motive equally direct to form illegal combinations to raise prices, and it is quite immaterial whether such results follow or not, as it is sufficient for the argument that such is the *tendency* of the contracts in question.

I cannot help observing that I always suspect a fallacy is lurking in the ratiocination, where I see some particular word introduced and harped upon, and twisted into every possible shape. Reasoning is so apt to degenerate into verbal disputation, that the greatest care is necessary to prevent oneself losing sight of sense and ideas in vain discussions upon the mere counters which represent thought. Thus the present argument resorts to the word *tendency* at every step, and indeed does not seem to be able to frame any distinct proposition without the employment of the term. But as *tendency* is not a technical law term of conventional value, it must represent a distinct idea, as applicable to this argument, which, if it has any precise and uniform meaning, is capable of being translated into other language. Let us see then what this idea is. If the contracts in question are adverse to public policy, it must be either because the effect of them upon the whole is to lower prices and so to diminish the public revenue, or to raise prices, and so to injure the consumer. It is quite clear that the contracts cannot produce both these results, though it is possible they may produce neither, and yet both these results are pointed at as proofs of their evil *tendency*. The argument in question also draws a distinction between public policy and public interests, which is notable, and indeed novel, but the argument does not pause to explain the apparent collision, but contents itself with simply alledging that if prices are lowered, the first is affected, if they are raised, the latter.

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Now with respect to the public revenue, it is so obvious that the general results of these contracts may be to raise the revenue, that it is impossible, when the argument is carefully analyzed, to say they are injurious to public policy on that score, and accordingly this branch of the argument was very faintly insisted upon at this bar.

With regard then to the public interests, the question is whether the consumer, in point of fact, is injured by these speculations, for if on the whole these contracts should turn out to have operations on his interests, or to have even a beneficial operation by steadying prices, it would seem a monstrous conclusion to arrive at, that the contracts are void on public policy, on account of their evil tendency to produce all sorts of possible or impossible offences. Now the effect of speculation on the market is a very difficult question to decide. Say that prices are ultimately governed by the relation between supply and demand, the adjustment between these two is no doubt regulated by the opinion of the day, and on this opinion every idle rumour and immaterial event operates, more or less strongly. A large portion of mankind is credulous, weak minded, or desponding, and when these persons happen to be holders of saleable commodities, a rush is made into the market to sell on the slightest cause that may appear to them portentous. Another class comprizes the sanguine, and the head-strong, who never lose confidence in their star, and whose tendency is to operate exactly in the contrary direction—and then a third class, perhaps the select few of the community, stands by and profits by the faults of either. Thus, speculation and even time bargains, may, on the whole, operate to prevent prices from being unduly affected, by either needless fears, or exaggerated hopes.

The Defendant, however, contends that it is immaterial for him to point out what the probable results of these time bargains may be, and that it is sufficient for him to show that they have a *tendency* to produce illegal and improper acts on the part of the contracting parties; and he relies on *Evans v. Jones*, and *Gilbert v. Sykes*. But the answer to these two cases is simple; in each of them the Court was able to see its way to the conclusion that the particular contract was injurious to the public interests; in this case the Court does not possess materials for forming such a conclusion—No lawyer will doubt, I think, that *Evans v. Jones*, which was a bet relating to the conviction of a third party, was properly decided. None are more fitted than Judges to decide what acts are likely to induce witnesses to commit perjury, and to interfere with the due administration of justice. I think that the bet on the life of Napoleon was, perhaps, also

well decided, though I doubt whether the reasons of the learned Judges are not somewhat far-fetched and unsatisfactory. One Judge, for instance, held the bet to be void on the ground that the Yorkshire Baronet who made it, had an interest to assassinate Napoleon; another Judge assigned as his reason, that the other betting party, the clergyman, had an interest not to kill Napoleon, in case of his invading the country as an enemy; and a third Judge held that the bet was bad on neither of these grounds, and, indeed, that it was a valid contract. Still in both these cases the majority of the Court found their way to a conclusion based on public policy. But in the present case, as I said before, the Court is not able to see what the evil tendency of these time bargains is, and I say this on the authority of *Hibblewhite v. McMorine*, *Wells v. Porter*, *Morgan v. Pebrer*, and *Oakley v. Rigby*.

I do not forget the able arguments which Mr. *Crawford* addressed to the Court, as to the evil consequences to trade which these contracts might produce, and the frauds such as that committed in *Levi v. Levi* and Lord Cochrane's Stock exchange transaction, to which they might give rise. These possible results were eloquently pointed out, and I do not think they could have been placed more forcibly before the Court. But they have all been addressed in equally forcible terms to the Courts at home, and in vain.

Lord Tenterden held that time bargains were attended with the most mischievous consequences, and in *Bryan v. Lewis* and other cases, disallowed them, but his decisions have been expressly overruled. Mr. *Tomlinson* to the Court of Exchequer, and Serjeant *Manning* and others to the Court of Common Pleas, placed the subject in every possible view, and scarcely any question of the day has received more judicial consideration. I therefore think I am justified in holding that the Courts of law are unable to pronounce judicially that time bargains are injurious to public policy.

It only remains for me to observe that throughout this discussion I have treated time bargains and wagers such as that now before us, as identical. Any considerations of public policy which would make the one invalid, apply with equal force to the other, and it was therefore with the soundest logic that Lord Tenterden classed them under the same category in *Bryan v. Lewis*. But moreover the identity of the two contracts has been specially brought to the notice of the Court in *Wells v. Porter*, and *Oakley v. Rigby*, where the defence was that the time bargains for the delivery of Stock were, in fact, mere wagers, and it was held to be an immaterial distinction. And it is quite obvious to any one who knows anything of stock exchange trans-

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actions, that these operations at Bombay are, in fact, exactly the same as those which take place in London. The same wants, the same passions, the same occupations, lead men both in the East and West into similar transactions, although a different garb and form may clothe their contracts as well as their persons; "*facies non omnibus una, nec diversa tamen*," as we have constantly occasion to observe when we come to compare Native with European transactions.

And thus in the present case the contract to pay 75 times the difference on a fixed price of one chest of Opium, and the price at a future day, is, in substance, the same contract as a purchase of 75 chests at that price, where the delivery is to be made at a future day. And so also, the paying a sum of money down, on the promise of the other party to pay five times the difference on one chest if it exceeds so much, is the common stock-jobbing operation of paying a premium for the liberty of calling for so many chests on a certain day, if the price should attain the amount agreed upon.

And lastly if a distinction were to be taken between this wager, and an ordinary time bargain, it would be at once evaded by speculators throwing all their wagers into the form of the latter.

I regret the great length into which I have been led, unavoidably, to set out the grounds which have compelled me to differ from the Chief Justice, and it is a great satisfaction to me to think, that, if they are erroneous they can do no harm; whereas if they are sound, they may facilitate the parties in their endeavours to get them confirmed by a higher tribunal.

Sir D. Pollock, C. J.—This is the case of a Wager of a very peculiar description on the price of Opium; to be determined at the Government Sale of Patna Opium, which should take place, next after the making of the wager. I have considered the question raised upon the Demurrer in all its bearings, and the numerous cases which are to be found applicable to the subject; and the result in my mind is, that the wager in question is void, in consequence of its being contrary to the principles of sound policy; and that therefore there ought to be judgment for the Defendant. I regret that my opinion should not coincide with that of my learned brother; but I cannot but think, (unless it is to be considered that in the case of time bargains, where the Courts have upheld them, although in some cases agreed upon as wagers, and admitted so to be, the decisions are to be taken as having concluded all arguments on such matters; as my learned brother has very broadly thrown out,) that this case is so distinguishable in its tendency from all that have preceded it, as to leave it open to the Court to

adopt a contrary decision, in perfect conformity with the general principles which all the Courts have dwelt upon very strongly, and have been disposed to uphold in every practicable instance. It is undeniable that wagers have been uniformly discouraged by our Courts in England. But as the legality of wagers, (unless brought within the exceptions which have been raised from time to time) has been too often recognized, to be now successfully questioned; it remains to be considered, whether the present wager, from its very nature and obvious tendency, is not so completely against the public interest as to bring it within the exception of being contrary to sound policy. It is unnecessary to consider the various objections which have led the Courts to declare certain wagers illegal; except perhaps for the purpose of proving, that the decisions have proceeded upon the tendency of the wagers themselves, quite irrespective of the parties to them; but that, however improbable it might be, that any illegal act would be committed by the parties, to secure a victory; yet, if the wager had a tendency to produce the commission of such acts, it was held sufficient to avoid it. Thus in the case of *Gilbert v. Sykes*, which was a wager upon the duration of the life of Napoleon Bonaparte, and was held to be illegal and void, as tending to the assassination, or other violent death of the subject of it; the Court never would have acted upon the idea, that either the plaintiff, who was a Clergyman, or the defendant, a well known and honorable person, could be suspected of promoting such a mode of terminating their engagement to each other. But this, and all the other similar cases, have been decided entirely upon the consideration of the consequences to which such a wager tends. It was upon the same principle that the decisions took place in *Cole v. Gower*, (6 East 110,) and *Hartley v. Price*, I also pass by the decisions upon gambling in the Funds; because that was the subject of an Act of Parliament; and that Act being silent on the subject of foreign funds, it followed, of course, that any transactions respecting them, were not within the statute.

The cases on which the plaintiff's counsel have mainly relied, are those in which the dictum of Lord Tenterden, at Nisi Prius, in *Bryan v. Lewis*, has been questioned and overruled; and a principle established, that Time Bargains for Goods, may be enforced, even if they are admitted by the parties to be mere Wagers, provided they do not come within the established exceptions. The strong cases upon this point, are those of *Hibblewhite v. McMorine*, and the cases there quoted; and it must be admitted, that the decision of *Hibblewhite v. McMorine*, has

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settled, that a time bargain for goods, or even a wager respecting their price, is not illegal, unless brought within the exceptions, one of which is, that it is contrary to sound policy. I am of opinion that by the numerous Wagers laid by the plaintiffs with various parties, two of which only have been argued before the Court, the natural consequence or tendency in the plaintiffs was, to influence the next Government sale of Opium, upon which the decision of the wager depended, by some contrivance, by which the price should be enhanced beyond the marketable price, and the higher the sum at which the Opium should be sold, the better would it be for the Plaintiffs; as the interest they had created by the wager, was, that they were to receive in one case, five, and in the other case, seventy-five times the amount of the difference between the current or real value of the Opium, and the price at which it should be sold, at such Government sale. Was, therefore, such an interest contrary to sound policy or not? The extent to which cupidity will go to secure an advantage, was strongly evidenced in a case that has not been quoted at the bar, but which, I think, furnishes in the judgment of the Court, composed of very able Judges, a guide to the decision of the present case, upon the broad principles of public policy. I allude to the case of *Rex v. DeBerenger and others*, (3 Maule and Selwyn, 67.) The defendants were indicted and convicted of a conspiracy, to occasion, without any just or true cause, a great increase and rise of the public government funds, and government securities of this kingdom; and in the judgment of the Court, upon a motion in arrest of judgment, Lord Ellenborough says; "the purpose itself is mischievous, it strikes at the price of a vendible commodity in the market;" and although the gist of the offence of which the defendants stood convicted, was, effecting their mischievous object by spreading false rumours; yet the Court appears to have entertained no doubt as to the mischievous effects of interfering improperly with the price of a vendible commodity in the market, as being contrary to sound policy; and in his Judgment *Dampier, J.* says; "the means used are wrong, they were false rumours; the object is wrong, it was to give a false value to a commodity in the public market, which was injurious to those who had to purchase." This case therefore completely establishes the principle, that to give a false price by raising it, is contrary to sound policy; while the authority of *Levi v. Levi*, affords a similar decision with regard to the illegality of an interference with the free course of an auction, by a combination to lower the prices. Now to apply these principles to the present cases which the Court is en-

titled to consider, as two of a large number pending before us, in which the same plaintiffs appear in all. The large interest thus created, almost in an infinite number of times, of the difference, between the price of Opium fixed in the wager, and that at which the declaration alleges the average price per chest to be, upon the first government sale, clearly shows, that so large a pecuniary interest is created in the plaintiffs to raise the price, that the tendency would naturally be, to impel them to adopt measures for raising the price very extensively. This appears to have been effected by some means or other; for it cannot be presumed to have occurred naturally: such a consequence, by creating so high and fictitious a price, might, and in many instances would, inevitably have the effect of paralysing the market; of creating a convulsion in the Opium trade generally; which would disable many from completing those engagements, which, in the management of commercial concerns, those who deal in Opium would have been justified in entering into; relying upon the fair competition which usually takes place at such Public Sales as that in question, with *bond fide* biddings by merchants engaged in that branch of trade, and unaffected by the adventitious, though extensive interest, created by a gambling wager. It appears to me that such consequences are too probable to be doubted about; and might produce all the pernicious effects of bankruptcy, insolvency, or ruinous loss among the members of the Opium trade. The plaintiffs (if the wager could be enforced) would be perfectly secure; even if they, in order to win the wager, became the purchasers of all the Opium; for the receipt of the multiples of the difference from the various parties with whom they have betted would indemnify them for such an infringement (as I think it) of the right of the public. Upon the ground therefore, that the natural tendency of these wagers is contrary to sound policy, I am of opinion that they are illegal, and cannot be supported.

I have refrained from referring to many of the cases cited at the bar; such as, *Da Costa v. Jones*; *Evans v. Jones* and others; as having been decided upon points of objections, which do not arise here, but which serve to show how ready the Courts have always been to repress wagers, when they could legally do so. And I may also remark that the reasoning of Mr. Justice Buller in the case of *Good v. Elliott* although overruled by the majority of the Court has been largely imported into the grounds on which subsequent cases have been decided; and it has been, among Lawyers, a subject of general regret, that the case of *Good v. Elliott* had not been decided the other way.

There will therefore be Judgment for the defendant.

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The Plaintiff, by Power of Attorney appointed A. D. M. and C. F. carrying on business under the Firm of M. F. and Co. to be his true and lawful Attornies and Attorney jointly and severally, in their individual names, or in the name of the said Firm, &c., on his behalf to *sell, endorse, and assign*, or to receive payment according to the course of the Treasury, of all or any of the securities of the East India Company &c., to which he then was, or might lawfully be entitled, &c. *Held*—that no authority empowering to *pledge* the securities in question, was thereby conferred on the agents.

Held also—that the agents could not become purchasers or transferees of the above securities; as they would then by their own act, create in themselves an interest, at variance with their duty, as vendors for, and agents of, the Principal.

DETINUE to recover three Company's Papers of the 4 per cent Loan, numbered respectively as follows—1st 11,914 of 1832-33, dated 1st May, 1832, for Sa. Rs. 14,000.—2nd 13,612 of 1832-33, dated 1st May, 1832, for Sa. Rs. 5,000.—3rd 13,397 of 1832-33, dated 1st May, 1832, for Sa. Rs. 5,000.

The pleas were—1st. non-detinet.—2ndly. Not possessed.—3rdly. As to the Co.'s Paper of the 4 per cent Loan, numbered 13,397, for Sa. Rs. 5,000—that the said Company's Paper was and is transferable by endorsement, and that the plaintiff before the detention of the same, to wit on the 20th day of September, 1841, endorsed the same in blank, and delivered the same, to wit, to one A. D. Macleod; and that the said Company's Paper, being so endorsed, and being and remaining in the possession of the said A. D. Macleod, he the said A. D. Macleod endorsed and deposited, lodged, and pledged the same to and with the defendants, to be by them kept as a pledge and security for and until the payment, not only of a certain sum of Co.'s Rs. 4,500, then agreed to be, and in fact lent and advanced by the defendants to A. D. Macleod, but also of all and every other sum and sums, which the defendants had already advanced, or engaged to advance, or which they might thereafter advance, to the said A. D. Macleod, his executors, administrators, or representatives, with interest at 12 per cent. with power and authority to the defendants to sell and dispose of the said Company's Paper for the reimbursement to the defendants of the said principal sum and in-

terest, and of all and every other sum or sums with interest as aforesaid, on or after the expiration of three months after the said 25th of September, 1841, by public or private sale. That subsequently and before the commencement of the suit a sum of Co.'s Rs. 8,000 became and remained due and owing from A. D. Macleod to the defendants, and that, by reason thereof, the defendants then sold and disposed of the Company's Paper in the introductory part of the 3rd plea mentioned, which is the detention in the 1st count complained of. Verification.

—The 4th plea was similar to the 3rd, with this difference—

• that it was pleaded as to all the Company's Paper mentioned in the plaint, alledging that the *plaintiff* endorsed, deposited, and pledged the same with the Bank, as a security for A. D. Macleod's debt—and lastly, as to the residue—never indebted.

At the trial which took place on the 14th of December last, it appeared that in January 1840, the plaintiff quitted India for England, leaving the Government securities in question in the custody of the firm of Macleod, Fagan and Company, the members whereof at that time, were A. D. Macleod and Christopher Fagan. The plaintiff some time afterwards executed, and sent out to his brother A. D. Macleod, a Power of Attorney. The original having been mislaid, a copy in the terms following (admitted by the defendants to be correct)—was received in evidence,

“ Know all men by these presents, that I, James William Macleod; at present of Southampton, do make, constitute, and appoint Alexander Donald Macleod and Christopher Fagan, carrying on business in Calcutta as Agents, under the firm of Macleod, Fagan, and Company, to be my true and lawful Attornies and Attorney jointly and each of them separately in their individual names, or in the name of the said Firm, or of any other Firm or Firms which they or their associates or successors may adopt for carrying on the said business, and on my behalf to sell, endorse, and assign, or to receive payment of the principal, according to the course of the Treasury, of all or any of the securities of the East India Company for shares in their public Loans;

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payable from their Treasury at Fort William in Bengal, to which I am now, or may be lawfully entitled, and to receive the consideration money, and give a receipt or receipts for the same, and to do all lawful acts requisite for effecting the premises, hereby ratifying and confirming all that my said Attorney and Attornies shall do therein by virtue hereof. In witness whereof I have hereunto set my hand and seal this 3rd day of August, 1841.

(Signed) J. W. MACLEOD.

In the month of September following, A. D. Macleod applied to the Bank of Bengal for two Loans to himself, upon the security of the three Government Promissory notes, which then stood in the sole name of the plaintiff. These notes were admitted by the Bank to be correct, and were put in evidence and marked respectively A, B, and C, and are so referred to and designated hereafter in the judgment of the Court.

The first of these notes was in the (usual) form as follows :—

FORT WILLIAM.

1st May, 1832.

Promissory note at 4 per cent for Calcutta,

Registered as	}	Sicca Rs. 14,000.	Accountant General's Office. (Signed) R. H. SNELL.
No. 11914 of			
1832-33			

The Governor General in Council does hereby acknowledge to have received—

From Madub Dutt

14,000 To J. W. MACLEOD, Esq.

14,000 from the 1st May, 1838.

J. W. MACLEOD.

(Signed) H. T. PRINSEP.

Across this note were the words

“ Examined. (Signed) J. DORIN, Deputy Accountant.”

“ Cancelled and renewed, 21st February, 1842.

(Signed)

It also bore the following endorsements: First, receipts for various half yearly payments of interest from the

Treasury, signed, "J. W. MACLEOD by his Attorney A. D. MACLEOD."—Then followed

(Signed) J. W. MACLEOD, by his Attorney A. D. MACLEOD.

„ MACLEOD, FAGAN & Co.

„ PROSOONOCOOMAR TAGORE.

Then a receipt for a half year's interest from the Treasury by Macleod, Fagan & Co.

(Signed) A. D. MACLEOD, Attorney for J. W. MACLEOD.

Pay to A. D. MACLEOD, Attorney for J. W. MACLEOD.

(Signed) MACLEOD, FAGAN & Co.

Pay the Bank of Bengal or order.

(Signed) A. D. MACLEOD,

Attorney as above.

The Bank then endorsed the note as follows,

Pay to Juggetchunder Mookerjee or order.

(Signed) J. B. PLUMB, *Deputy Secretary.*

This note was subsequently sent in for renewal, and then it was that the words "ATTORNEY AS ABOVE" were added by Bissonath Roy, the Clerk in the Treasury, who alleged that it was the custom of the office.

The second note for Sicca Rupees 5,000, at the time in question, also stood invested in the plaintiff's sole name. It was in the usual form and (after the statement of various receipts for half yearly payments of interest, signed J. W. Macleod, by his Attorney A. D. Macleod,) bore the following endorsements—

(Signed) MACLEOD, FAGAN & Co.

„ PROSOONOCOOMAR TAGORE.

„ MACLEOD, FAGAN & Co.

„ A. D. MACLEOD, Attorney for J. W. MACLEOD.

Pay to the order of A. D. MACLEOD, Attorney for J. W. MACLEOD.

(Signed) MACLEOD, FAGAN & Co.

Pay to the Bank of Bengal or order

(Signed) A. D. MACLEOD, *Attorney as above.*

Pay to Juggetchunder Mookerjee or order

(Signed) J. B. PLUMB, *Deputy Secretary.*

This note was also renewed, and, as in the instance of the first note, the words "Attorney as above" were added at the time of renewal.

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The third note for Sicca Rupees 5,000 was endorsed as follows—

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Pay to G. J. Gordon, Esq., Secretary Union Bank or order.

(Signed) J. W. MACLEOD, by his Attorney A. D. MACLEOD.

Pay to A. D. Macleod, Attorney to J. W. Macleod, or order.

(Signed) G. J. GORDON, *Secretary Union Bank.*

„ J. W. MACLEOD, by his Attorney A. D. MACLEOD.

„ G. J. GORDON, *Secretary Union Bank.*

Then half year's interest—

(Signed) J. W. MACLEOD, by his Attorney, A. D. MACLEOD.

„ J. W. MACLEOD, by his Attorney, A. D. MACLEOD.

Bank of Bengal
Power No. 2215.

Pay to Bank of Bengal or order.

(Signed) A. D. MACLEOD.

This note was then endorsed by the Bank to one Megnarain Roy, and bore the various endorsements of other parties through whose hands it subsequently passed, but which it is unnecessary further to mention.

Prior to making the advances on the security of the above notes, the Bank required information as to the extent and effect of the Power of Attorney held by A. D. Macleod from his brother the plaintiff.

With regard to this part of the evidence, Mr. Bracken, the Secretary to the Bank, stated that “at the time A. D. Macleod applied for the loan on the security of the Paper numbered 13,397 (C) that document bore the blank endorsement, “J. W. Macleod, by his Attorney A. D. Macleod,” and under *that blank endorsement* (as well as on the faith of A. D. Macleod's representation to the same effect) be considered him (A. D. M.) the holder and proprietor of the note. The Power was referred to for the purpose of ascertaining with certainty that the proprietary right was in the holder, as a necessary part of his title. The Papers numbered 11,914 and 13,612 (A and B) were not given exactly under the same circumstances, the endorsements “J. W. Macleod, by his Attorney A. D. Macleod” were made to “Macleod Fagan & Co.”

The power as required, was produced, and inspected

by the Bank and on the notes being specially endorsed by A. D. Macleod to the Bank, the latter received them in pledge, advancing Co.'s Rs. 4,500 on the paper numbered 13,397 (C) and Co.'s Rs. 17,000 on the other two, (A and B), in each instance taking from A. D. Macleod a bond containing clauses to the effect stated in the pleas.

In January of the year 1842 Macleod, Fagan & Co. were adjudged Insolvents, and shortly afterwards, the Bank, with a view to indemnify and repay themselves the amount of the loans advanced by them to A. D. Macleod, in pursuance of the terms of the bonds above referred to, sold the Government paper.

For the defence it was objected, that there was no case to go to a Jury. That nothing appeared on the face of the documents to indicate the existence of any Trust; and as these were negotiable instruments, it was quite sufficient that the holder should possess the apparent title in himself. The enquiry as to the effect of the Power of Attorney held by him, was made only with reference to the preceding blank endorsement, the correctness of which it was necessary to discover, with a view to ascertain whether the holder was entitled under it. That preceding endorsement in blank, proved to have been in conformity with the Power, and the notes were consequently, properly received in pledge by the Bank.

The point was reserved, and ultimately, a verdict was found for the plaintiff, with liberty to the defendants to move generally.

A rule was accordingly obtained to show cause, why the verdict entered for the plaintiff should not be set aside and a nonsuit entered; or why the verdict should not be entered for the defendant, on the ground of misdirection; or why a new trial should not be had, on the ground of the verdict being against evidence.

Mr. Colvile, A. G. Mr. Cochrane, and Mr. Ritchie, 19th Jan. 1847. shewed cause.

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Mr. *Prinsep*, Mr. *Dickens*, and Mr. *Sandes* in support of the rule.

The facts of this case, the arguments and authorities cited, are fully noticed and commented on in the judgment of the Court so as to render it needless to recapitulate them further here.

SIR L. PEEL, C. J.—This is an action of detinue, brought to recover three notes, commonly called Company's paper, particularly described in the plaint, and which are the exhibits A. B. and C. The plaintiff obtained a verdict, and the case comes before the Court on a motion for a new trial. The defendants have pleaded, 1st, That they do not detain the notes. 2ndly. That the plaintiff was not possessed of the notes. 3rdly. As to exhibit C. that the plaintiff endorsed the same in blank and delivered it to one A. D. Macleod, and that A. D. Macleod endorsed, deposited, and pledged the same for value to the defendants; and 4thly, as to all the three notes, they plead that the plaintiff endorsed, deposited, and pledged the same with the Bank as a security for A. D. Macleod's debt. The replication to the third plea denies the endorsement and delivery from the plaintiff to A. D. Macleod, and the replication to the fourth plea denies that the plaintiff endorsed, deposited, and pledged the notes with the defendants. The other pleadings it is unnecessary to notice. The facts were that the plaintiff, who had been in this country, and who is the brother of A. D. Macleod, had left this country before the deposits hereinafter mentioned were made, but the precise date of his departure was not in proof. It was further proved that A. D. Macleod was at the time of these deposits, and had been for some time previously, a member of the firm of Macleod, Fagan and Co., a mercantile house then established in Calcutta. A power of Attorney from the plaintiff, dated Southampton, August 3d, 1841, was proved.

By that power the plaintiff appointed A. D. Macleod and Christopher Fagan, carrying on business in Calcutta, as agents, under the firm of Macleod, Fagan and Co. to be his true and lawful attorneys and attorney, jointly and severally, in their individual names, or in the name of the said firm, or of any other firm or firms which they or their associates or successors might adopt for carrying on the said business, and on his behalf to sell, endorse, and assign, or to receive payment of the principal, according to the course of the treasury, of all or any of the securities of the East India Company, &c. to which he then was or might lawfully be entitled, and to receive the consideration money, and to give a receipt or receipts for the same, &c. On the 25th September, 1841, A. D. Macleod applied to the Bank of Bengal for a loan on his own private account, and offered to deposit with them as a security the note (exhibit C) which he produced. The Bank on inspection of the note required the production of the power under which the endorsement in blank in the name of the principal was made, which was then the last endorsement on it, and the power before referred to was produced, inspected by the Bank, and a registry of it made, according to their usual practice. The power itself remained lodged with the Bank for two or three days afterwards. The Bank, after inspection of the power, made the advance and took the note C. in deposit as a security; and it was known by the Bank at the time that the loan was on A. D. Macleod's own private account. On the 27th of the same month, two days after, the notes A. and B. were placed by A. D. Macleod with the Bank as a security for an advance then made to him by the Bank on his own private account. When the note C. was brought to the Bank, it bore an endorsement in the name of the principal by procuration through A. D. Macleod, which was then the last endorsement on it, and which was put on it by A. D. Macleod some short time before the depo-

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sit of that paper, though it did not distinctly appear in evidence when that endorsement was made. The Bank took a further endorsement on that note from A. D. Macleod in his own name. On A. and B. the Bank took only A. D. Macleod's endorsement.

It was admitted on the trial that the endorsements by Macleod, Fagan and Co. which appear on the notes A. and B. were made by that firm, and it was proved that A. D. Macleod was a member of that firm, and that those endorsements were in his hand writing. The last endorsement on B. by Macleod, Fagan and Co. when that note was produced at the trial, was in these words: "Pay to A. D. Macleod, attorney for J. W. Macleod: Macleod, Fagan and Co." and the last endorsement on A. by Macleod, Fagan and Co. when that paper was produced at the trial was in these words: "Pay to the order of A. D. Macleod, attorney for J. W. Macleod: Macleod, Fagan and Co." Immediately following these endorsements on each paper respectively, was an endorsement by A. D. Macleod in these words: "Pay to the Bank of Bengal or order: A. D. Macleod." There was annexed to each of the last endorsements the words "*attorney as above*" written in small character, but it was clearly proved that these were subsequent additions improperly made and without any authority by some clerk at the Treasury. On the two endorsements above mentioned from Macleod, Fagan and Co. there was a contest at the trial, and conflicting testimony whether the words "*attorney for J. W. Macleod,*" were not also subsequently added. This contest was confined to the state of the endorsements; the Court found that the disputed words formed part of the endorsements from Macleod, Fagan and Co. as they originally stood, and were not subsequently added: and this finding we have no doubt was correct. The evidence, both positive and presumptive, appears to us on a review of it to preponderate in support of that conclusion. It

appeared that A. D. Macleod could not have had any opportunity of adding the disputed words to the endorsements whilst the note remained with the bank, and Mr. Molloy, who knew the hand writing of A. D. Macleod well, spoke unhesitatingly to his hand writing as to the whole of those endorsements, as they at the trial purported to be written. There was no evidence, and nothing to render it probable, that these notes ever afterwards were in A. D. Macleod's possession. Mr. Bracken, the then and thence continuing Secretary to the Bank, on the other hand, stated that when A. and B. were brought to him, the last endorsements they bore by Macleod, Fagan and Co. had not the disputed words; as to one, however, he did not speak positively, and he supposed that the words had been added at the Treasury. Mr. Plumb, the then and thence continuing Deputy Secretary to the Bank of Bengal, spoke doubtingly as to the disputed words on A. but expressed his belief that the disputed words were on B. when it came to the Bank, but that he was not certain. It is to be observed also that the words which were expressly proved to have been put on at the Treasury "Attorney as above" were merely words of reference; and a presumption arises, from the reference itself and the hand writing, that the disputed words were then in existence on the instrument. A witness from the Treasury proved that the words "Attorney as above" were added there, but no evidence was given that the disputed words were added there. Besides this, on an apparent re-transfer of C. by the Union Bank to A. D. Macleod, a similar form of endorsement, viz. "Pay to A. D. Macleod, Attorney to J. W. Macleod, or order," was made; which was followed by an endorsement in the name of the plaintiff by procuration of A. D. Macleod; and as, on C. an actual endorsement under the power before referred to, (which power bore date so late as 3d August, 1841,) did not deter the Bank from trusting

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to A. D. Macleod's mere assertion that that note was his, and from lending on that security as above mentioned, we can form no inference, from the advance made to A. D. Macleod on A. and B. that the disputed words were not on them at the time of that advance. It was admitted that the Bank of Bengal had under the pledges to them, and their powers under that pledge, sold the notes A. B. and C. in satisfaction of the debts due to them from A. D. Macleod. It was admitted that the several endorsements in the name of the plaintiff by procuration of A. D. Macleod prior to the 3d August, 1841, which were made upon A. B. and C. were made under a lost power of Attorney, which authorized the Attorney to endorse the notes in the name of his principal; but the admission was not meant to extend so far as to admit that such endorsements were valid executions of such last power, so as to transfer the plaintiff's property in the notes. The original admissions in the suit were defectively drawn; and had been prepared, as the Court was informed, on the motion for the new trial, not under the advice of counsel; and the Court, feeling a difficulty about the construction of the admissions, it was agreed between the counsel on a motion for a new trial on a suggestion from the Court, that admissions to the above effect should be then made, and taken as admissions made on the trial of the cause, for the purpose of enabling the Court to decide on all the questions argued before it, on the motion for a new trial. And the admissions in the cause were framed to carry that agreement and suggestion into effect. The fourth plea is not established by any evidence. There was no proof of any deposit or pledge by the plaintiff to the defendants. The third plea alleges an endorsement from the plaintiff to A. D. Macleod, of the note C. and a pledge by A. D. Macleod of that note to the Bank. That endorsement is denied. There was no proof of any delivery, in fact, of the note C. by the

plaintiff or any one to A. D. Macleod, *in the character of endorser of that note*; and unless it can be made out, that the mere possession by an attorney under a power, of the bill, which he is authorized by that power to endorse in the name of his principal, proves, as soon as he has written a form of endorsement on the bill in the name of the principal, a delivery to him of the bill as an endorser from his principal, the allegation is not proved. The mere writing the name of the principal is the act of the principal, done by a substituted, instead of by his own proper hand. To constitute a *transfer* of a bill endorsed in blank there must be delivery of it. In *Adams v. Jones*, (a) Lord Denman says: “now a bill may be endorsed to a party in two ways, either by a special endorsement, making it payable to that party, or by a blank endorsement *and delivery* to that party. In the latter way at all events, if not in the former, the bill *must be delivered to the party as indorsee*, in order to constitute an endorsement to him” The continuing possession under such circumstances as are above supposed, of the attorney is *primâ facie* referrible to the original delivery to him; and unless some change of circumstances be shown, the character of the possession must be viewed as unvaried. The original delivery is in such cases the delivery of an unendorsed bill, which the Attorney has authority to endorse in the name of his principal. But the party taking such bill from him (the Attorney) when endorsed in the name of the principal, must call for the power, or take the consequences of his neglect; as the principal will not be bound unless the authority conferred be pursued. The indorsement being by procuration is notice to the transferee— In *Attwood v. Munnings* (b) Mr. Justice Holroyd says, “The word “procuration” gave due notice to the plaintiff, and they were bound to ascertain before they took

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(a) 4 Per. & Dav. 197.

(b) 7 B. & C. 278.

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the bill that the acceptance was agreeable to the authority given." Mr. *Justice Littledale* says "It is said that third persons are not bound to inquire into the making of a bill; but that is not so when the acceptance appears to be by procuration. The question then turns upon the authority given." That was the case of an acceptance by procuration, but the Law is the same as to an endorsement. In *Fearn v. Felica* (a) *Chief Justice Tindal*, says: "If Grand had indorsed the bill with his own hand, there can be no doubt but that would have been sufficient to pass the property to a *bonâ fide* holder; but when the endorsement is made by a third party, the question is whether the third party had authority to endorse, and that lets in the inquiry as to what was the authority given to Lougan." The same doctrine is applied to restrictive or conditional endorsements. *Trentel v. Barandon* (b), *Sigourney v. Lloyd* (c), and *Robertson v. Kensington* (d). In *Sigourney v. Lloyd*, Lord Tenterden thus expresses himself. "The use of endorsements of this kind is not small, nor are they, as it seems to me, inconsistent with the interests and convenience of commerce. Such an endorsement will not prevent the endorser from receiving the money from the acceptor when the bill becomes due. If he pay it to his principal all will be well, but the endorser must look to him for the application of it. It will have the effect of preventing a failing man from disposing of the bill before it becomes due, and from pledging it, to relieve himself from his own debts at the expense of his correspondent. I cannot see that the interests of commerce will be prejudiced by our holding that such an endorsement is restrictive. On the contrary, I think that the interests of commerce will thereby be advanced. It is said that it

(a) 8 Scott. N.R. 241; 14 L.J. (c) 8 B. & C. 622.
C. P. 15. (d) 4 Taunt. 30.
(b) 8 Taunt. 100.

cannot be expected that bankers or others when requested to discount such bills as this, should look into the accounts between the principal and his agent. I agree it cannot be expected they should, but still if they take the bill so endorsed, they take it at their peril, and must be barred by the state of the accounts between these parties." If the payer to whom, or to whose order, a bill were to be made payable, should write an endorsement in blank on the bill, and give the bill so endorsed, to one for a special purpose, as, for instance, to his servant to put away; or for any other special purpose of the like kind, indicating an intention to retain the bill, and the servant should then transfer it for value, and without notice of the fraud, in fraud of his master's orders, the transferee would have a complete title to the bill, as the endorsee in law of the *payee* under such blank endorsement, *Adams v. Jones* (a) *Brind v. Hampshire*, (b) *Marsten v. Allan*, (c) and though some doubt was thrown out in *Hayes v. Caulfield* (d) whether the whole doctrine laid down in the case of *Marsten v. Allan* could be supported, no doubt was expressed on the general law, that a mere delivery for a special purpose inconsistent with a transfer, as for safe custody, for instance, does not constitute a transfer of a bill endorsed in blank, though it enables the actual possessor to transfer the bill to a *bond fide* holder for value and without notice of the fraud. *A fortiori* the mere continuing possession in the attorney, without *any delivery at all after the endorsement in blank*, (the endorsement in blank being unaccompanied by any change of possession,) does not amount to, nor evidence *a transfer by delivery* to such attorney, and any delivery to him in the character of attorney is a delivery to the

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(a) 12 A. & E. 455 ; 4 P. & D. 197. (c) 8 M. & W. 494.

(b) 1 M. & W. 365 ; 1 Tyr. & Gr. (d) 3 2 B. 84.

790 ; 5 L. J. (N. S.) Exch. 197.

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principal. If the attorney duly executes his power, and delivers under the power to a transferee for value, his act binds the principal. It is in law the writing and delivery of the principal himself. If the writing and delivery are simultaneous, no doubt can exist in any mind that this is no delivery to the attorney: to hold it otherwise would be to establish an unmeaning fiction, dividing mentally one single act into two, one a real and one a fictitious act. It is precisely the same thing if the attorney signs in anticipation of a subsequent intended transfer. Therefore, whilst the bill remains in his (the attorney's) hands under circumstances not proving or tending to prove a transfer to himself, the transferee cannot establish, as to such possession, an allegation of an endorsement *by the principal to the Attorney*. It was, however, argued that the Attorney A. D. Macleod might have sold this note 'C. to himself, that a sale to himself by an agent employed by principal to sell is good at law though not supported in equity: that Mr. Bracken might have supposed this, and that the Court may presume or assume it. There was no proof whatever of the fact. Does any ground exist for the assumption? We entirely dissent from the position that such a transfer would be valid at law. The principle of law is a clear one; that an Agent shall not by his own act give himself an interest at variance with his duty to his principal. By his sale to himself he would unite in himself the inconsistent characters of seller and buyer. It was decided by Lord *Ellenborough* in *Wright v. Wardle*, (a) that one of the contracting parties could not even be the Agent of the other for the purpose of signing the contract of purchase. In *Ex parte Dyster* in the matter of *Moline* (b) Lord *Eldon* treats it as a clear legal principle. The case was in bankruptcy, a petition to prove a debt, Lord

(a) 2 Camp. 200.

(b) 1 Mer. 172.

Eldon in that case says : “ there is nothing in these proceedings which imports that he was actually principal in those very dealings in which he was ostensibly concerned as a broker. If that fact were distinctly brought before me, I should have no hesitation in saying that *no action* could be maintained in respect of those transactions, inasmuch as they clearly amount to a fraud.” And Lord *Wynford*, in delivering the Judgment of the House of Lords in the case of *Rothschild v. Brookman*, says : “ I take it to be a general principle of law and equity that a man cannot be seller for one and a buyer of that property himself.”—He adds in conclusion of his judgment, “ I repeat, that Mr. Rothschild has only on this occasion followed a practice which I believe has been acted upon in London. It is fit your Lordships should now say such practice cannot be endured. If they are common, it is fit your Lordships should say in language that cannot be misunderstood that such practices must not continue to prevail.” In the case *Gillett v. Peppeneau* (a) Lord *Langdale*, the Master of the Rolls, expresses similar sentiments. “ It is said that this is every day’s practice in the city ; I should be very sorry to have it proved to me that such a sort of dealing is usual, for nothing can be more open to the commission of fraud than transactions of this nature. Where a man employs another as his agent, it is on the faith that such agent will act in the matter purely and disinterestedly for the benefit of his employer : and assuredly not with the notion, that the person whose assistance is required as agent, has himself, in the very transactions, an interest directly opposite to that of his principal. It frequently, I believe, happens that the same person is agent for both parties, in which case he holds an even hand and acts in one sense as arbitrator between them : but if a person employed as an

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(a) 3 Beav. 83.

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agent on account of his skill and knowledge is to have in the very same transaction an interest directly opposite to that of his employer, it is evident that the relation between the parties then becomes of such a nature as must inevitably lead to continual disappointment, if not to the continued practice of fraud." We entertain the same opinions as those expressed by Lord *Eldon*, Lord *Wynford*, and Lord *Langdale*. We have chosen to fortify our opinions by higher authority than our own. The condemnation of the practice, that an agent may purchase for himself goods which he is entrusted by his principal to sell, applies strongly to the case of an agent in this country for an absent principal in England, entrusting him with his property for sale. It is obviously the interest of the agent, if he *may* purchase, to purchase at a time when it would not be for the interest of the principal to sell. The distance and want of power of supervision in the principal would leave him much exposed to the commission of frauds, if an agent so restricted to sell, could purchase for himself. The language of the power in question is inconsistent with the notion that any such power was intended to be conferred: no presumption can arise of a purchase which could not have been supported; and no evidence raises any presumption that such a purchase in fact ever took place. It appears to us, therefore, that there is nothing to show that any endorsement was made by the plaintiff of the note *C. to A. D. Macleod*, and that that issue was properly found for the plaintiff. On the issue raised on the plea of not possessed, the question is the same as to all the notes. A question was made whether in detinue, a lien in the defendants could be proved under this plea. It is matter not settled. But we are of opinion that this defence in this action is admissible. It is a question as between the plaintiff and defendants not of lien but of property. The suit relates to negotiable se-

curities, and the effect of a transfer *bond fide* and for value of such securities transferable by delivery is to transfer property though the actual transferrer have none. It is true that it would be subject to redemption if the transfer were in fact a pledge. But there would not be an absolute and also a special *property* in the notes, created by the transfer, so as to render it necessary to plead a lien. The plaintiff proved his title, by proving that all three were made payable to him or his order. It then lay on the defendants to show that the property was divested, as against him at least. The actual transfer to the defendants was on a pledge to them by A. D. Macleod, for his own private debt; which pledge the registered power which applies to C. clearly did not authorize; nor is it possible to presume that the lost power contained any such authority. It was said that a factor or agent might pledge the bills of his principal for his own debt; for that he could pledge such bills, though he could not at common law pledge the goods of his principal under a mere power of sale. The reason, however, of the distinction was not adverted to; it turns on difference in the nature of the property, not on any difference in the nature of the authority. A power of attorney is construed strictly whether it relate to goods or bills. The intention governs, and a man who gives a power authorizing a sale of his bills or other negotiable securities for his own purpose, certainly does not intend to confer, and does not confer on the agent thereby, the power to pledge the securities for the private debt of the agent. And as long as such securities require an endorsement in the name of the principal, no such power of pledging exists, or can take place to the prejudice of the donor of the power, the owner of the unendorsed securities: nor can the attorney, by merely writing the form of an endorsement in the name of the principal on the securities, give himself such a power, or additional security to his trans-

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feree, for such transferee must call for the power, and will take subject to its due execution ; and no subsequent endorsee or transferee would be in a better position than the first. It would be wholly immaterial as against the payee, how many names were subsequently put on the paper, either through a connected and unbroken chain of endorsements in full, or after an endorsement in blank ; the legal interest in the bill would still remain in the payee, for no endorsement authorized by him would have taken place ; as in *Fearn and Felica*, and the case of *Robertson v. Kensington*, before quoted. It is true that in *Fearn v. Felica* there was no authority at all to endorse a bill of the particular description ; but the principle is a general one, that when an acceptance, or the drawing or endorsing of a bill, is not by the proper hand of the acceptor, drawer, or endorser, but made by another in his name, the question is always whether that other had authority to do the act ; and the judgment of *Chief Justice Tindal* before quoted, asserts the general principle. It resembles the case of a *conditional endorsement*, as in *Robertson v. Kensington*. The subsequent indorsers have their remedy against prior intermediate indorsers ; but as between the payee and any indorsee, when the first endorsement is by procuration, the case turns on the due execution of the power. If the case of *Collins v. Morton*, (a) be examined, the judgment of *Eyre, C. J.* will be found fully to support the doctrine, that the power of an agent pledging his principal's bills in satisfaction of his own private debt, turns wholly on the nature of the property. Bills specially endorsed to the agent, bills payable to order and endorsed in blank, bills originally made payable to bearer,—all these he may transfer, as his own act ; and if he pledge them for his own purposes, and the lender be not cognizant of the fraud, he is se-

(a) 1 Bos. and Pul.

cure ; the reason is because the nature of the property is such, that the bill under such circumstances is deemed the property of the agent conclusively for the purposes of transfer to a *bond fide* transferee ; but in unendorsed bills, made payable to the principal or order, the property is in the principal, though the possession be transferred to the agent : and the power, in such a case, is a naked authority, which must be strictly pursued. It is unnecessary to say any thing as to a pledge of bills for the owner's use under a power of sale ; a pledge for the agents use is clearly unauthorized. But the defendants urge, that there was an endorsement in blank on the notes in the name of the principal, and so the notes became payable to bearer. It is admitted that such endorsements were made in fact ; and that an endorsement in the name of the principal was authorized for some purpose ; no more is admitted, and nothing was proved as to the transactions with the Union Bank or any other parties except the Bank of Bengal. No power was proved which authorized a pledge for A. D. Macleod's own purposes : none such can be presumed. The lost power is admitted to have justified a transfer by a blank endorsement in the name of the principal, but it is not admitted nor proved under what sort of a power, whether general or limited, the transfer apparent on the notes took place ; nor under what circumstances, whether they were in execution or in abuse of the power. There was proof of the limited power subsequently given ; and no proof of any necessity for one more general. We can make no intendment in this case against the payee of any due execution of any power by his Attorney A. D. Macleod. The plaintiff stands on his right as payee ; if his attorney have transferred the notes, it is for the defendants, who assert that such is the case, to prove it. The plaintiff, the principal, whose case is that he is the payee of the notes, is not bound to call

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the attorney, or other person to prove, that a fraud has been committed on the plaintiff. It lies on those who rest on the authority, to show affirmatively the authority and its due execution; they show that the plaintiff gave a power to the attorney, which authorized the attorney to endorse the notes in the plaintiff's name, for some purpose which is not disclosed, for they gave no evidence of the object for which the lost power was given, nor showed that such proof was unattainable. It does not appear that the defendants could not have proved the nature of the power and the nature of the transactions with the first *de facto* endorsee; and we are unable to collect from any facts, proved or admitted, that any due exercise of any power ever took place. It was said that his due execution of the power must be presumed; as an abuse of his trust would be the imputation of a criminal act, the power being an instruction in writing to the agent. We think, however, that, assuming the statute to apply, an excess of such power is not necessarily a criminal act under the statute. (a) And the case of *Williams v. East India Company*, (b) is no authority in support of the position, that the due execution of the power must be *presumed*. On the contrary, the concluding part of the judgment treats presumptive evidence of this kind as inferior, whilst better evidence remains; and here it is not shown that no better could be had. We see no limit to the application of such presumptions, if this be admissible. It might be urged, that a disputed hand-writing must, *prima facie*, be treated as genuine, since signing a name to an instrument, without authority, is unexplained, *prima facie*, evidence of a false making. And in all cases of agency the onus of proof would be shifted, and it appears from the act itself that no such consequences were intended to result. We think, therefore, that no blank endorsement

(a) 9 Geo. 4. c. 74. s. 105.

(b) 3 East. 192.

was proved in this case, divesting the property of the payee. Let it be assumed, however, that such proof was made, still there was proof of the property in the notes being subsequently in the plaintiff, and no proof that it was again divested, but, notwithstanding that circumstance, a transfer by A. D. Macleod to the Bank, *bond fide*, of the notes, if endorsed in blank, would transfer the property to the Bank. It becomes, therefore, necessary, on the assumption, that an effective endorsement in blank in the name of the principal was proved, to consider whether the Bank can be viewed as *bond fide* holders. They had notice of circumstances, including the state of the notes themselves, which, in our opinion, made it their duty to enquire as to the mode in which A. D. Macleod made out his asserted property in the notes. They made no enquiries whatever, whether the registered power was intended to embrace A. and B. as well as C. They knew that it applied to C. pledged to them but two days before; and A. D. Macleod's production of it, in reference to that note on their demand for a power, admitted of no other construction. It might not be necessary to endorse even C. under it, if a good execution of the former power had once taken place as to that note. But the case does not depend as to the point of *bond fides* on the necessity, as to any of the notes, of a transfer under the power, which was registered: but on the notice of the plaintiff's interest in the notes, which the transmission and acceptance of that power, together with all the circumstances of the case, conveyed. They knew also of A. D. Macleod's connexion with the house of Macleod, Fagan and Co. who appeared as indorsees on the notes, no enquiry whatever was made *how* that firm or A. D. Macleod had acquired any interest in any of the notes. A sale by A. D. Macleod to his firm would be equally prohibited with a sale to himself. The transaction of the deposits was close upon the transmission of the power. On the depo-

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sit of A. and B. no power whatever was called for, though the first endorsement was by procuration. It was not proved that the lost power was *then* lost, or that its contents, if it were then lost, could not be learnt. It appears on the notes themselves, that there had been transactions with the Union Bank: no enquiries were made of A.D.Macleod or at that Bank into their nature. That the agent had himself purchased, or that his house had purchased through him the notes in question from the plaintiff, is an inadmissible assumption, and the Bank required no proof whatever in support of the assertion made by A. D. Macleod, that he was the owner of the notes. It was urged that the words "attorney for J. W. Macleod" were merely a *descriptio personæ*. It would, however, have been not merely an unmeaning, but an untrue description, injurious to the interest of A. D. Macleod himself, if he had been the owner of the notes. We think that the conduct of the Bank, in not calling for enquiry, under circumstances, which, in our opinion, so loudly demanded it, prevents them from being viewed as *bonâ fide* transferees for value. And we found this opinion, not on the exploded ground of carelessness or want of prudence, whether in a greater or less degree. If we were to support the transaction, we should establish, as a consequence resulting from our decision, this position; that an attorney for an absent principal, entrusted with the government paper of his principal, payable to that principal or order, and unendorsed by such principal, has only to write a form of endorsement by procuration in his principal's name, on the back of the security, and then he will be able to raise money on it for any purpose of his own, if he will but assert the property to be in himself. We should decide, in effect, that a fiction of some transfer to the attorney is to be adopted, and that a power is to be viewed as in the nature of proprietary right. Such a decision would be opposed to the principles of law, and to

the uninterrupted current of decisions, and it would tend to encourage breaches of trust. Such a decision could not tend to promote the true interests of commerce, which depend so much on the due performance of fiduciary engagements. The interests of depositors must be considered, as well as the interests of those to whom depositaries may resort for aid, when requiring pecuniary advances. We think that one who forbears to enquire, under such circumstances as the present, resting on a bare statement of an agent, needing an advance, that the property is his, whilst all the circumstances point to an opposite conclusion, must stand or fall by the truth or falsehood of that statement. It is his duty to enquire, where the interests of third parties are apparent, and the absence of enquiry would facilitate frauds. And if he do not make that enquiry, because he thinks that the law does not demand it of him, he must take the consequences of his error.

Rule discharged.

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JOSEPH AGABEG carrying on trade and business in Partnership with JOHANNES AGABEG & AVETICK GALSTIN under the name and Firm of AGABEG BROTHERS,

vs.

GEORGE JELlicoe.

COVENANT on a charter-party in the following terms: "This Indenture, made and agreed to the 10th day of April, 1845, between Captain G. Jellicoe, of Calcutta, of the one part; and Messrs. Agabeg Brothers of the other

entered into a contract under seal, but signed the instrument in the name of his Firm.—*Held* that he was sole covenantee, and therefore, rightly sole Plaintiff on record.

By one of the covenants of the Charter-party it was provided, that if the Charterers (Plaintiff) or their Agents in Rangoon refused to give a full cargo of teak timber to the Vessel, they should pay a damage of Rs. 4,000 to the Defendant, as the probable amount of freight expected to be brought by the Vessel—likewise—if the Defendant or the Commander of the Vessel refused to fulfil the contract in bringing up a cargo of Teak timber for the plaintiff; the Defendant should pay a damage of Rs. 4,000 to the Charterers.—*Held* to be in the nature of penalties and not liquidated damages.

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*Charter-party
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to sign.—right to sue
—Penalty—liquidated
damages.*

One Partner cannot bind another by deed without the express assent of the latter: such act being beyond the ordinary scope of a partner's authority.
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part; Witnesseth, that the said Captain Geo. Jellicoe (owner of the ship or vessel called the "Stalkart" of the burthen of tons or thereabouts, whereof A. R. Dixon is the Master, now riding at anchor in the river Hooghly, and bound to Port Louis, Mauritius, with a cargo of sundries,) consents and agrees to let, hire, and charter the said vessel, to the said Messrs. Agabeg Brothers, and the said Messrs. Agabeg Brothers consent and agree to hire, freight, and charter the said vessel from the said Capt. Geo. Jellicoe, for a voyage from Rangoon to Calcutta, upon terms and conditions, and for the considerations as follow: That is to say the said Capt. Geo. Jellicoe shall and will cause the commander of the said vessel, or their agents at the Island of Mauritius, on the arrival of the said vessel at Port Louis, to discharge the whole cargo of the said vessel without the least delay or loss of time, and immediately after such discharge or unloading, to cause to proceed, to send or despatch the said vessel to the Port of Rangoon, and on the said ship's arrival there, a report of her being ready to receive cargo to be made, given, or sent by the Commander or Captain to the Agent of the said Messrs. Agabeg Brothers at Rangoon, (Mr. G. S. Manook,) and, in his absence, to any other person or persons acting for him; and that the said Agent or Agents of the said Messrs. Agabeg Brothers at Rangoon, on receiving such report or notice as aforesaid from the Commander of the said ship, shall and will, on behalf of the said Messrs. Agabeg Brothers, fill and load the said vessel with as much cargo of marketable and sound teak timber, (consisting of masts and keel pieces, duggies, coozars, shinbins, gun-carriage pieces, and sheathing boards) as she can safely take and carry in her hold, and between decks. It is hereby agreed and consented to, that the said Capt. Geo. Jellicoe shall and will pay all such Port charges as may be incurred by the

said vessel at the Port of Rangoon, with the sole exception of landing charges. It is hereby further agreed and consented to, that immediately after the said vessel is so loaded and filled with cargo of timber, the Commander of her shall and will proceed in the same to Calcutta, and the whole cargo of timber that the ship shall have brought, shall be landed, and sold and disposed of by Public Sale at Calcutta, and the net proceeds of such cargo of timber, on a deduction therefrom of all such charges as are common and usual, namely, all loading charges at Rangoon, Auctioneer's and Agent's commission, cooly and boat hire, ground rent, and rope for rafters, divided into equal parts, a portion or moiety whereof paid to the said G. Jellicoe as owner of the said vessel for rent hire, or consideration of the said ship, and the other half taken by the said Messrs. Agabeg Brothers for themselves as the value of such timber; save and except the freight on sheathing boards, which will be calculated at the rate of 25 per cent. as usual. The payment of such freight will be made 33 days after landing the whole cargo of the said vessel at the Port of Calcutta. Freight of any kind or description soever, that the said vessel may bring up in such Ports and places where she cannot possibly carry timber, to be owned and retained wholly by Geo. Jellicoe, the charterers, Messrs. Agabeg Brothers, to have no claim to or share in it. Thirty working days to be allowed for loading the ship with timber, and despatching her, from the day the vessel shall be ready to receive cargo on board. Either party detaining the vessel beyond the 30 working days allowed, shall pay to the other a demurrage of Co.'s Rs. 100 per diem. Lastly, it is hereby expressly agreed by and between both parties, that the said charterers, Messrs. Agabeg Brothers, or their Agents in Rangoon, are to give a full cargo of teak timber to the said vessel, and fulfil their agreement: and in case of their non-performance of this agreement, and

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refusal to give a full cargo of teak timber to the said vessel; they are to pay a damage of, say Co.'s Rs. 4,000, to the said Geo. Jellicoe, as the probable amount of freight expected to be brought by the vessel. Likewise Capt. G. Jellicoe or the commander of the said vessel refusing to fulfil and perform the contract of this agreement, in bringing up a cargo of teak timber for the said Messrs. Agabeg Brothers, shall pay a damage of Rs. 4,000 to the said Messrs. Agabeg Brothers, (the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature, or kind soever excepted). In witness whereof the parties subscribing do hereunto affix and set their hands and seals in Calcutta, the day and year first above mentioned.

(Sd.) GEO. JELlicoe. (L. S.)

„ AGABEG BROTHERS. (L. S.)

“ Signed, sealed and delivered }
at Calcutta, in the presence }
of }

(Sd.) P. J. SARKIES.”

The plaint, after setting out the terms of the charter-party, stated “that the ship or vessel proceeded from the river Hooghly aforesaid to the said Port Louis, and afterwards, to wit on &c., reached the said Port Louis in safety, and there without delay unloaded her cargo, and afterwards, to wit, &c. sailed from Port Louis, and subsequently reached Calcutta, but that the defendant did not nor would cause to proceed, or send or despatch the said ship or vessel to Rangoon aforesaid, and that the said ship did not enter the said Port of Rangoon, but then returned from Port Louis aforesaid to Calcutta without having entered the said Port, and without having received or taken on board at Rangoon aforesaid any cargo of timber. That the plaintiff was ready to perform, fulfil, and keep all things in the said charter-party on his be-

half contained, and that the Agent of the said Agabeg Brothers, at Rangoon aforesaid, at the time of the sealing of the said covenant, was and from thence hitherto hath been and still is, one Gregory Sarkies Manook, and that the said G. S. Manook, as such Agent, was ready and prepared to load the said ship or vessel with a full and complete cargo of teak timber of the plaintiff, as in the said charter-party mentioned, when and as soon as the said ship should and might enter the said Port of Rangoon, on her said voyage from Port Louis to Calcutta aforesaid. That the said ship or vessel was not hindered or prevented from entering the said Port of Rangoon, or from receiving on board the said last-mentioned cargo by the act of God, or the Queen's enemies, or by fire, or by any danger or accident of any kind whatsoever. Averment, as breach ;—that the defendant neglected and refused, and still doth neglect and refuse, to pay to the plaintiff the said sum of Co.'s Rs. 4,000, and every part thereof, contrary to the tenor of the said covenant of the defendant, in that behalf made as aforesaid. And so the plaintiff in fact saith, that the defendant hath wrongfully broken his said covenant, and to keep the same with the plaintiff hath hitherto neglected, and still doth neglect. By means whereof the said cargo of teak timber could not be, and was not brought to Calcutta, and was of little value to the plaintiff; and the plaintiff hath lost all the gains and profits which he otherwise might, and would have made, by selling the said timber at Calcutta."

The pleas were: 1. Non est factum. 2. Traverse of readiness and willingness by plaintiff or his agent to load the vessel with a cargo of timber. 3. That the vessel sailed from Port Louis and arrived off the bar of the Rangoon river, but was prevented, by stormy and tempestuous weather, and contrary gales, from entering the Port, or procuring a Pilot, or remaining at anchor outside. That she was driven out again to sea, and unable to re-

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turn, and compelled to proceed to Calcutta; and that the defendant was thereby prevented from fulfilling his covenant. Issue was joined on the two first pleas, and *de injuria* replied to the last.

At the trial a nonsuit was urged. *First*,—On the ground that a variance existed between the charter-party declared on, and the plaint itself; as the signature “Agabeg Brothers” at the foot of the instrument showed that the contract was entered into between the firm of “Agabeg Brothers,” and the defendant Jellicoe; whereas the plaint alleged the plaintiff to have contracted, as sole covenantee. *2ndly*,—On the ground of the non-joinder, as plaintiffs, of the other partners of the firm of Agabeg Brothers, all of whom, according to the tenor of the signature, appeared to be covenantees in this deed. The Court reserved the last point, giving defendant’s Counsel leave to move on the ground stated; and as to the 1st point, (upon application by plaintiff’s Counsel) gave leave to amend the plaint, by substituting the words “and certain persons therein described as Messrs. A. Brothers, which said A. Brothers were then a firm, carrying on trade in Calcutta, under the style aforesaid, and of which the plaintiff was then a partner,” instead of the former words “and the plaintiff (then being one of the partners in and carrying on trade and business under the firm of Agabeg Brothers as aforesaid.)” A verdict was ultimately found for the plaintiff with Co.’s Rs. 4,000 damages, being the sum mentioned in the charter-party; but as the plaintiff had not proved the precise loss sustained, and the Court considered it doubtful whether the Co.’s Rs. 4,000 was intended by the deed to be in the nature of a penalty or as liquidated damages, leave was also given to move to reduce the damages to a nominal sum.

A rule was accordingly obtained, calling on the plaintiff to show cause, why a nonsuit should not be entered on

the following grounds: 1st,—That no deed had been put in evidence, between the defendant and the plaintiff alone, or with the plaintiff and his partners, they not being a corporate body. 2ndly,—That the three partners, and not the plaintiff solely, were the covenantees, and should therefore have been joined in the action. 3rdly,—Why the damages should not be reduced to a nominal sum.

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Mr. *Dickens* and Mr. *Wylie* showed cause. It is admitted that, if the plaintiff's other partners had been covenantees, they ought to have been joined. But that is not the case. One partner cannot bind another by deed, without authority; *Harrison v. Jackson*, (a) here there is no evidence of assent or of any authority by his partners to Joseph Agabeg to sign for them, and, in the absence of express evidence, the fact cannot be assumed. Although, therefore, the covenant may be for their benefit, still, they cannot be joined as plaintiffs suing on this record, for they are not parties to the deed, and no other than one who is such party to a deed, can have a right to sue on it. The case of *Metcalf and Rycroft* (b) is expressly in point. That was covenant on a deed of composition with creditors, by one of two partners, who signed in the name of his firm, and set his seal thereto, for nonpayment of an instalment due on a partnership debt; and it was held, that the other partner, not being a party to the deed, could not join in covenant. *Ld. Southampton v. Brown* (c), *Stover v. Gordon* (d), *Berkley v. Hardy* (e) and *Barford v. Stuckey* (f) are authorities to the same effect. As to the other point—the charter-party provides for the payment by plaintiff of certain penalties in several events, but there is only one stipu-

(a) 7 Term Rep.

(d) 3 M. and S. 308.

(b) 6 M. & S. 75.

(e) 5 B. & Cr. 355.

(c) 6 B. & Cr. 718.

(f) 1 Bro. & B. 333.

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lation for a payment by the defendant, and that is an absolute condition for the payment by him of Co.'s Rs. 4,000, in case of failure by him in bringing up a cargo of timber from Rangoon. *Leighton v. Wares (a)* is in point, for in that case, as in this, there is nothing to show that the parties contemplated the occurrence of particular damages, and intended to take the penalty so incurred, as a settlement of the whole.

Mr. *Montriau* and Mr. *Ritchie*, in support of the rule; Upon the first point;—This is a deed inter partes, but the description of one of the parties viz. “Agabeg Brothers” is not such, as is recognized by law. This is not a description, nor intended to be a description of the plaintiff alone, nor of any person whatever, and therefore not excusable as merely inaccurate.

The description of a grantee or covenantee must be of one in *rerum naturâ*, and by some name, whereby he may be known, *Com. Dig. Grant. A. 2, Fait. C. 2, E. 3.* “To the making of every good deed containing any agreement, these things are requisite: 1. Writing. 2. That there be a person able to contract, and to be contracted with, and a thing to be contracted for, and that all these be set down by sufficient names.” (b) To hold this to be a description of the persons composing the trading partnership of Joseph Agabeg, Johannes Agabeg, and Avetick Galstin, would be conferring upon them an illegal privilege. To act as a corporation is a criminal act, and an usurpation of the Royal Prerogative, *Duvergier v. Fellows. (c)*

Secondly,—If this be a sufficient description, all the partners are covenantees, and all must sue, because all may sue, *Petrie v. Bury, (d)* and their interest is joint. The cases cited of *Metcalfe v. Rycroft* and *Berkeley v.*

(a) 3 Mees. & W. 545.

(b) Shep. Touch, cap. 4.

(c) 5 Bing. 248, ubi vide judgment of Best C. J. in fine. See

also *Reg. v. West*, 1 G. & D. 481,

Cooch v. Goodman 2 G. & D. 159.

(d) 3 B. & C. 353.

Hardy are clearly distinguishable. In the first, the plaintiff's partner did not come within the description of the parties to the deed; he could not therefore be a party to the covenant. Here, the description is general, and not confined to the partner, who, in fact, sealed the deed. *Berkeley v. Hardy* was covenant upon an indenture of lease, not executed by the lessor, the plaintiff in the action. There was therefore no lease.

Thirdly,—If this action be maintainable, specific damage must be proved: and the Rs. 4,000 cannot be taken as liquidated damages. Jellicoe is to pay all port charges, except loading charges: the nett proceeds are to be equally divided, save and except the freight on sheathing boards, which are to be calculated at the rate of 25 per cent. as usual, the payment of such freight is to be made three days after landing the whole cargo of the vessel at the port of Calcutta, freight of any description and kind soever that the vessel may bring up in such ports and places where she cannot possibly carry timber, to be owned and retained wholly by Jellicoe, the charterer, Agabeg Brothers to have no claim or share in it. Demurrage of Rs. 100 to be mutually paid: and in case of the non-performance by the charterers of this agreement, and refusal to give a *full* cargo of teak timber to the said vessel, they are to pay a damage of say Co.'s Rs. 4,000 to the owner, as the probable amount of freight expected to be brought by the vessel. Likewise, the owner or commander refusing to fulfil and perform the contract of this agreement, in bringing up a cargo of teak timber for Agabeg Brothers, to pay them a *damage* of Rs. 4,000. Here are a number of stipulations, the breach of which is of very unequal importance. The most trifling deficiency in the supply of cargo, as well as total refusal must be estimated alike; many contingencies may arise of breach of these covenants, in which an absurd and disproportionate advantage would be given to one

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party, if this sum is to be treated otherwise than as a penalty. It comes within the class of cases where an estimated sum is construed, from the nature and context of the agreement, to be a penalty, and not a fixed amount of damage, *Boys v. Ancell* (a), *Exparte Maclean* (b), *Harrison v. Wright*. (c)

Cur. ad. vult.

SIR L. PEEL, C. J. This is a deed inter partes. There seems no doubt that the transaction in question was a partnership one, and intended by the plaintiff to be for the benefit of his partners, as well as himself; but there is no proof of assent by the former, and without their assent and authority the plaintiff cannot bind his partners by a charter-party under seal. It was rightly argued that the real question was, whether Joseph Agabeg was not the sole covenantee; for if the covenant was joint, all the co-covenantees should have joined in the action. The case of *Petrie v. Bury* cited for the defendant, was that of a *Trust*; and *C. J. Abbott* in his judgment says "Trustees often assent to a trust without executing the deed which creates it, and they may assent to it at any time, and without an express allegation of dissent, which will not appear. Assent is therefore to be *presumed*." Here the transaction in question is a commercial one, between partners, and some evidence of assent must be given: if actual presence at the time of execution of the deed be sufficient—that even has not been shown. There is no case which decides what amounts to sufficient evidence of assent by partners to a deed executed on their behalf: but no presumption can be made in favor of the fact of one party having assented to acts done by another, beyond the scope of his ordinary authority. The action therefore has been rightly brought in the sole name of Joseph Agabeg. On the other point there is much diffi-

(a) 5 Bing. 390.

(b) 2 M. D. & D. 564.

(c) 13 E. 343.

culty ; but we cannot decide that there is a provision for a penalty on the one hand, and for liquidated damages on the other. We, therefore, must consider the Rs. 4,000 to be in the nature of a penalty, and not liquidated damages. The verdict must be reduced to a nominal sum, but there may be a new trial on payment of costs.

Rule accordingly.

In Equity.

SREE MOTEE NABOODOORGA DABEE

vs.

CONNYLLOL TAGORE, and other Executors, &c.

MOHONEYMOHUN TAGORE, by the first and second clauses of his will, dated 25th day of November, 1819, bequeathed as follows :

“ 1st Item. My wife the mother of Srijut Connyloll Baboo is to receive Rs. 50,000, with the interest of which she will perform pious acts. This amount is to be placed to her credit in the account of Srijut Connyloll Baboo and Srijut Gopaloll Baboo and she will receive interest thereon yearly at the rate Company's Paper bears. On her death my two daughters Sreemotee Naboodoorga and Sreemotee Sridooraga are to receive the amount in equal shares. If they bear children they are to receive the same as their children become of age and if they do not bear children they are not to receive the same and Srijut Connyloll Baboo and Srijut Gopaloll Baboo are to receive this amount. Thus —”

are to receive these sums ; and they are not to receive the interest also now.” Naboodoorga bore children, and her eldest son had attained majority ; Sridooraga died childless—*Held* that there was no evidence of intention by Testator to confer a benefit of survivorship ; nor any ground for implying cross remainders ; that the gifts of Rs. 50,000 in both clauses were distributable ; and on fulfillment by one daughter of the condition attached, viz : production of a son, and his subsequently attaining majority, the daughter so producing was entitled to her own share, although the other daughter might not have also fulfilled the condition. As Naboodoorga, therefore, had given birth to a son, who had attained majority, she was entitled to her moiety of each bequest : but as Sridooraga had died childless, the gift to her had lapsed, and fell into the residue—

Held also—that the mother's right became vested on her eldest son attaining majority : and that interest became payable upon the legacies from the period of their so vesting.

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*Hindoo will
Construction
Legacy
period of vesting
interest when
chargeable.*

Testator by his will, after giving the interest of Rs. 50,000 to his wife for life, bequeathed as follows. “ At her death my two daughters shall receive the amount in equal shares. If they bear children they are to receive the same as their children become of age ; and if they do not bear children they are not to receive the same, and Connyloll and Gopaloll are to receive this amount. 2nd Item my daughter Naboodoorga shall receive Rs. 25,000 and Sridooraga Rs. 25,000 in the whole 50,000 — they are not to receive these sums now, but on sons having been born of them, they

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"2nd Item. My eldest daughter Sreemotee Naboo-doorga shall receive 25,000 Rs. and Sreemotee Sridoorga 25,000 Rs. ; in the whole, 50,000 Rs. are to be placed to their credit in the account of Srijut Connyloll Baboo and Srijut Gopaloll Baboo they are not to receive these sums now but on sons having been born of them and becoming of age they are to receive these sums and they are not to receive the interest also now the Baboojees will give them food and clothes."

"The 3rd Item (amongst other things) directed that as long as Connyloll and Gopaloll (sons of the Testator) remained minors, their mother, Juggodissoree Dabee, should continue mistress of his property on their part, and that the Testator's elder brother, Ladleymohun Baboo, should remain in the mean time manager on behalf of Juggodissoree." It is unnecessary to notice the remaining clauses of the will, as nothing turned upon them. In April, 1820, Mohoneymohun Tagore died, leaving him surviving all the parties above named, viz. his widow Juggodissoree; his two sons Connyloll and Gopaloll two daughters, whereof the complainant was the eldest, and Sridoorga the youngest; and also his brother, Ladleymohun Tagore. The two sons of the testator, Connyloll and Gopaloll, being infants at the time of their father's death, Ladleymohun, in pursuance of the direction contained therein, obtained probate of the will, and, as executor or manager thereunder, took possession of the real and personal estate and property of Mohoneymohun, and continued to hold and manage the same, until Connyloll attained the age of 18 years, (which happened in the year 1829,) Connyloll then entered into possession and continued to manage the property, in substitution of Ladleymohun, until his younger brother Gopaloll attained his full age, in the year 1833; when the two entered into joint possession and joint administration of the estate, Ladleymohun having first fully accounted to them for such estate of the Testator as had come to his hands, and

Connyloll and Gopaloll having executed a release to him in respect thereof.

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Shortly afterwards Ladleymohun died. Some time previous, in the year 1823, Sridoorga had departed this life, intestate and unmarried, leaving her surviving her mother, the defendant Juggodissoree Dabee, her sole heiress and representative, according to the Hindoo law. In 1824 the complainant intermarried with one Pertaubnarain Mookerjee, by whom she had a son, born about four years afterwards, named Mohindromohun Mookerjee, who attained his majority, according to the Hindoo law, in July 1844.

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The bill prayed (among other things) that it might be declared that the rights of the complainant under the 1st and 2nd clauses of the will became absolutely vested, on her son Mohindromohun attaining his full age, and that she was entitled to receive, and be paid forthwith, the sum of 25,000 Sa. Rs. with interest from such time, and at such rate as the Court should think fit. And also for a declaration that the complainant was entitled as to one moiety in her own right, and as to the other moiety by survivorship, to the whole of the other legacy of Sa. Rs. 50,000, subject only to the life interest therein, of the defendant Juggodissoree, the same to be payable at the death of the latter; and for an account.

The case now came on upon evidence against the defendants Connyloll and Gopaloll, and upon bill and answer against Juggodissoree. None of the facts of the case were disputed. The defendants admitted assets; and the only questions raised were those upon the construction of the two first items of Mohoneymohun's will.

Mr. Colvile, A. G., Mr. Morton and Mr. Taylor for the complainant—contended—*Firstly*, in consequence of her sister Sridoorga having died unmarried and childless, the complainant is entitled, on the death of Juggodissoree

1847. (the widow), to receive the whole of the bequest of Rs. 50,000 mentioned in the 1st clause, one moiety in her own right, and the other by survivorship, at her sister's decease, the words "*in equal shares*," creating a joint tenancy between them, with benefit of survivorship. For the same reasons the complainant is also entitled by survivorship, to the sum of Rs. 25,000 mentioned in the 2nd clause. *Skey v. Barnes (a)*, *Currie v. Goold (b)*, and *Scott v. Bargeman (c)*.

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2ndly,—The legacies vested on the birth of a son by either daughter, and on that son's attaining majority.

3rdly,—Interest became payable on the legacies from the period of their so vesting.

Mr. *Dickens* and Mr. *Ritchie* for the Executors. 1st, Each daughter is entitled to her own share, on her fulfilling the condition attached to the bequest to *her*, irrespective of the share or moiety to the other. On failure by both or either of the daughters, the whole or a moiety of the bequest goes to the Executors. Cross remainders cannot be implied unless the whole fund becomes payable at once. Here the conditions may be fulfilled at different periods, *Turner v. Frederic (d)*, *Taniere v. Peakes (e)*, *Jones v. Randall (f)*.

2nd. The question, as to when the legacies vested, we leave in the discretion of the Court.

3rd. As to interest. That is chargeable not from the period the legacies may have vested, but from the time they became due and payable.

Mr. *Clarke* appeared for Juggodissoree (the widow.)

Cur. ad. vult.

(a) 3 Mer, 345.

(b) 4 Beav. 117.

(c) 2 P. Wms. 69.

(d) 5 Sim. 466.

(e) 2 Sim. & St. 383.

(f) 1 Jac. & W. 100.

SIR L. PEEL, C. J. I shall state the reasons which influence my own judgment separately, for although my colleagues agree with me in the result of the decision, yet there is some slight difference in our reasons for the conclusion we have come to. My opinion is founded on the circumstance that the will under discussion is that of a Hindoo. The question whether survivorship is implied or not is one which depends on the evidence of intention on the face of the will. Cases on the construction of English wills, afford little light as to the mode of collecting the intention of a Hindoo Testator, if regard be had to the different view in which Hindoos look upon their male and female progeny and other circumstances peculiar to that race. In cases where cross-remainders have been implied in the English law, the question has always been decided by evidence of intention arising on the face of the will, whether the limitations have been of estates tail or of other estates. The evidence of intention may vary according to the nature of the estates limited, but alike in all will it be found, that the decisions have turned on the fact of the will indicating, that the ultimate gift shall not take effect, piecemeal, therefore, not until the exhaustion of estates not given in terms, and consequently only imperfectly given. But though the intention be, that the gift over should not take effect piecemeal, that is not decisive of the question whether cross limitations should be implied. The reason given in the text of Mr. Jarman's work on Devises, for implying them in estates tail, to avoid chasms in the estates, (which, however, a descent would prevent,) is no other than that the law leans against a partial intestacy. But the reason seems to be that unless cross-remainders were implied, the ultimate limitation could not take effect as a *remainder* of the whole, and would be void as an executory devise for remoteness, a reason indeed which is given in the notes to the same work. In the cases of

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gifts of personalty, or of estates in fee, given over on contingencies not too remote, the same reason for implying cross-remainders does not exist, and in cases of contingent estates or interests, no good reason (apart from that of intention) appears to exist for implying them. If it be a vested legacy, the representative of the legatee is entitled till the happening of the contingency: if it be a contingent legacy, why is not the representative of the Testator entitled till the happening of the same contingency?

Upon the best consideration I have been able to give to the case, it seems to me, that the evidence of intention is very defective. There is nothing to show that the Testator meant, upon failure of the condition by one daughter, and the fulfilment or completion of it by the other, that the moiety of the former should go to the latter. The legatees over are the sons, who are also the general legatees, and the persons who by Hindoo law, would be the general heirs in case of intestacy. The case in 3rd Merivale, is not applicable to one like the present, where the legatees over, the general legatees, and the parties entitled in the event of intestacy, are identical. I do not construe the bequest over to the Executors as a devisable bequest, but as a bequest of the whole fund, and as taking effect only in failure of issue to both daughters; yet, nevertheless I think there is no implication thence, of an intention on the part of the Testator, in the event of one share failing to vest, to give it to the other daughter. It is an event overlooked on the part of the Testator. The share to that daughter becomes, on that unlooked for event, undisposed of, and falls into the residue: the complainant is therefore entitled only to the bequest of Rs. 25,000, and also to Rs. 25,000 on the death of her mother. The interest is to be allowed, only from the time the money vested, viz. when the eldest son attained majority. The costs will come out of the estate, for the will is ambiguously worded.

Mr. Justice Grant. I concur in what has fallen from the learned Chief Justice, but I put my judgment upon the construction of the will merely. The clear intention of the Testator was to give these legacies to his daughters, if they had children, in order that the latter might be provided for. I consider that the word "they" is to be taken distributively. The meaning, therefore, is, that in the event of either daughter dying without male issue, her share should go over to the Executors. The bequests are contingent, and Sridooroga's never became vested at all, and goes to the residuary legatees. This is consistent with the case cited of *Turner v. Frederick*.

The same construction is applicable to the bequests in the second clause of the will, Rs. 25,000 is given to each daughter, the whole to be placed in the hands of the Executors to their credit, with a condition attached, which each daughter must fulfill for herself—and Sridooroga never having, during her lifetime, fulfilled the condition, her share never became vested. As to the interest, I also think, that is payable from the time the legacy vested.

Mr. Justice Seton concurred.

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NUSSEERWONJEE RUTTONJEE

vs.

TARRONJEE RUTTONJEE.

1847

*April 5,
Monday.*

*Capias ad resp.
Arrest*

*Bail rules 3 and 6
Sheriff's duty.*

*A writ of cap. ad
resp. requiring a
Defendant to put*

A RULE had been obtained, calling upon the Plaintiff to show cause, why the writ of *capias ad respondendum*

in special Bail within eight days, must be executed within Calcutta or 10 miles thereof.

If a Defendant at the time of issuing the writ be within those limits, and subsequently depart there-out, so that he cannot be arrested, the Sheriff must apply for further instructions.

1847.
In Equity.
SREEMOTEE NABOO-
DOORGA DABEE
v.
CONNLYOLL TAGORE

1847.
Plea Side.

RUTTONJEE
 v.
 RUTTONJEE.

issued in the cause, should not be set aside; or why the Defendant should not be discharged from the custody of the Sheriff, upon filing common bail.

Mr. *Dickens* showed cause. The writ in question was regularly obtained upon the usual affidavit, and the arrest under it was perfectly regular. The only ground advanced for the purpose of setting it aside, is that of the Defendant having been arrested at *Moulmein*, and brought thence to Calcutta. It is immaterial to consider where the Defendant might have been at the time of the arrest; the real question is, where was he at the time of plaint filed and writ issued. He was then in Calcutta, but having, immediately afterwards embarked and sailed to Moulmein, the Sheriff followed, and, as was his duty, arrested him there.

Mr. *Morton* in support of the rule. The motion is in the alternative, either to set aside the writ, or to discharge the Defendant upon filing common bail. Although the writ itself may have been perfectly regular, yet it is manifest, that the arrest under it, was an abuse of the process of the Court. The form of the writ itself shows, that the Judge who issued it, intended that it should be executed in Calcutta, or within a certain distance of that place. The Sheriff is required to take the Defendant, if he should be found in the provinces, districts, or countries of Bengal, Behar, or Orissa, or in any of the Factories, districts, or places annexed to the Presidency of Fort William, and to keep him safely until he should have put in bail, or made deposit according to law; at the same time the Defendant is required to take notice that within eight days after execution, he is to cause special bail to be put in for him to the action. From the tenor of this notice it is clear, that the writ was to have been executed in Calcutta or its neighbourhood; for by the 3rd and 6th

Bail rules—only eight days are allowed for perfecting special bail, where the writ is intended to be executed within the limits of Calcutta or ten miles thereof; but where the writ is to be executed at Moulmein, sixty days are allowed. If the Defendant had been arrested in Calcutta, or within the prescribed distance, he would have been able to put in the required bail, but this became an utter impossibility, when he was arrested at Moulmein.

1847.
Plea Side.

RUTTONJEE
v.
RUTTONJEE.

SIR L. PEEL, C. J.—We think the arrest was not properly made. The Sheriff is bound to know his duty, and he must be presumed to have ascertained from the form of the writ, whether it was intended to be executed in Calcutta, or within ten miles thereof or otherwise. Here the form of the writ shows, that the Judge who granted it, did so with the intention that it should be executed in Calcutta or its neighbourhood—when it was discovered, that execution of the *capias*, according to its terms, had become impracticable, application ought to have been made to the Court, with a view to alter its form, in accordance with the altered circumstances of the case. As the writ only allows eight days' time to perfect bail from the date of arrest, it follows, that if the party is arrested at Moulmein, he is called on to perform an impossibility. We cannot say that the writ was irregular, but we have no doubt whatever, that it was granted for the purpose of being executed in Calcutta, or the neighbourhood, and not elsewhere. The arrest, therefore, under it was not made in pursuance of the intention of the Court in granting it. The party must be discharged on filing common bail.

Order accordingly.

1847.

May 10.
Monday.*In Equity.*

SREEMUTTY BAMASOONDERY DOSSEE

vs.

SREEMUTTY RAJCOOMAREE DOSSEE, and others.

*Jurisdiction—
Constructive inhabi-
tancy.*

One Khistnochunder, in his life time, possessed a dwelling house in Calcutta, where he occasionally resided with his family. After his death the Defendant Rajcoomaree, his younger widow, became entitled to a share in that family dwelling house, but never did during her widowhood actually reside there. *Held* that she was subject constructively to the jurisdiction.

THIS case came on for hearing upon evidence, taken on a plea to the jurisdiction by the defendant Rajcoomaree.

The bill had been filed by the younger widow of one Kistnochunder Biswas, a wealthy Hindoo zemindar, against his elder widow, and other parties, in respect of his estate, real and personal. The ground of jurisdiction laid in the bill, was "*constructive inhabitancy*" founded on the possession of a share of an alleged family dwelling house, situate at Simlah in Calcutta.

Mr. *Clarke* and Mr. *Dickens* for the complainant.

A case of constructive inhabitancy has clearly been made out. The evidence taken on behalf of complainant, shows, that Kistnochunder in his life-time was possessed of two houses, one at Kurdah near Barrackpore, and another in Calcutta, and that he used the latter as a residence, nearly, if not quite as frequently, as the old family house at Kurdah. He bought the house in Calcutta, about seven years previous to his death, and always, from the time of the purchase until his death, kept a large establishment there. The property in question descended to his widows, and the same establishment of servants was kept up, although the widows never resided in the house, or had even been there, since the death of Kistnochunder. This amounts to a "*constructive inhabitancy*" sufficient to support the jurisdiction laid. *Khamah Dossee v. Sebpersaud Bose (a)*, and *Golucknath Bose* against *Raj-*

(a) Morton Sup. Crt. Rep. 181.

kissen Bose (a). The only case to be relied on by the other side is that of *Tumsook Roy* against *The Nawab of Moorshedabad (b)*, which was decided on its own special grounds. There, although by the residence of the Vakeel, a beneficial use resulted to the owner—yet there was not any *user in fact*. A collateral, rather than a contradictory case, is set up by the defendant, viz : that the Court of Wards had taken possession of the property in question, but it does not appear when the inception of their tenure took place. Besides, it is submitted, the possession of the Court of Wards does not affect the question in the least.

1847.
In Equity.

BAMASOONDERY
DOSSEE
v.
RAJCOOMAREE
DOSSEE.

Mr. *Morton* and Mr. *Fulton* contra :

The doctrine of constructive inhabitaney has never been extended to the length contended for here. In *Toomsook Roy v. the Nawab of Moorshedabad*, the defendant was held *not* subject, although he was the proprietor of a residence in Calcutta ; it appearing he had never resided there himself, although he had placed a Mooktear and an establishment of servants there. So in the present case, although it is admitted on the evidence, that Kistochunder had occasionally resided in the Calcutta house, with his family, yet that occurred only when he came down on matters of business, probably with a view to confer with the revenue authorities. The defendant, it is proved, has never during her widowhood resided there, nor has she done any act signifying her intention to treat the Calcutta house as a residence. On Kistnochunder's death the Court of Wards took possession of the whole estate, and it was by their orders, and under their direction, that the establishment was kept up. It is a very material question, whether that Court was in possession at the time of bill filed. The documentary evidence shows that

(a) *Fulton's Rep.* 401.

(b) *Morton's Rep.* 172.

1847.
In Equity.

BAMASOONDERY
DOSSEE
v.
RAJCOOMARRE
DOSSEE.

the Court was in possession at one time, and it does not appear that such possession has since been given up. Besides, it is a question in dispute between these parties, to whom this very house belongs, and the right to it is yet *sub judice*.

The real questions here are—1st, whether the Court of Wards was actually in possession at the time of filing the bill; and 2ndly, whether the defendant has by her acts raised a constructive jurisdiction. In Khamah Dossee's case, there was a family house where the family *continued* to reside. So in the case from *Fulton's Rep.* 401, the manager of the family lived at the house. None of the cases cited on the other side carry the point further than that a "constructive inhabitancy" was consequent on the acts of the parties.

It is contended here, that the circumstances proved are such as show, that the defendant never acted so as to make this a residence, and thereby raise a constructive inhabitancy.

Mr. *Clarke* replied.

SIR L. PEEL, C. J. We think the jurisdiction is made out in this case. It appears to have been the settled law of Court, even in Mr. Spankie's time, that having a share in a family dwelling house in Calcutta, was a ground of jurisdiction on the principle of constructive inhabitancy, even in the case of a party, who had never been actually in Calcutta at all. And his opinion (printed in the *Appendix to Morton's Rep.* p. 393) refers to the cases of infants, as well as adults. Indeed it is not easy to understand on what principle it can be urged, that the question is affected by the circumstance of the defendant being under a disability or in a state of pupilage. The Court of Wards must be taken to act according to the Regulations; and they show that that Court is merely in

the position of a committee or manager of the estates of those who become their Wards. The legal estate and interest remain unchanged. It is not easy to understand Chief Justice Ryan's doubts in relation to *Hurrynauth Roy's* case, and he appears to have misunderstood the extent of Mr. Advocate General Spankie's doubts, and the ground on which that learned counsel advised an appeal in that case. The only decision at all apparently opposed to the current of authorities is the case of *Toomsook Roy v. Nawab of Moorshedabad*. Perhaps that decision may be explained by supposing that, under the circumstances, the Court considered the Mooktear as a sort of Steward of the Nawab, and in the position of a *tenant* of the Calcutta house, and that no constructive residency therefore could be ascribed to the defendant. In any other view, the decision is at variance with the current of authorities, and indeed with some decisions of Chief Justice Ryan himself. If this Court was in error in adopting the doctrine of constructive jurisdiction originally, that error can now be set right only by the Privy Council. At all events, the Court must be consistent in its decisions. Either the doctrine of constructive jurisdiction must be abandoned altogether, or else carried out in all its results. This Court cannot sanction one law for Nawabs and Rajahs, and another for ordinary suitors. The plea must be overruled; but, as some of the *dicta* cited certainly appear to have thrown doubts upon the question, the Court will not give costs.

Plea overruled, without costs.

1847.
In Equity.

BAMASOONDERY
DOSSEE
v.
RAJCOOMAREE
DOSSEE.

1847

July 2.
Friday.*In Equity.*

MUDOOSOODUN PYNE and others

vs.

HURRYDOSS MULLICK. (a)

*Jurisdiction
Constructive Inhab-
itancy.*

The Defendant jointly with his two brothers, inherited a house in Calcutta, wherein the latter usually resided; but the Defendant only came down occasionally to reside there.

Held that he was constructively subject to the Jurisdiction.

PLEA to the JURISDICTION.—The bill of complaint set out a Bengallee Ekrar or agreement, dated 2d July, 1846, entered into between the complainants and defendants, whereby the latter was appointed agent or manager of the house of business of the former, carried on at Charnock, or Barrackpore, and whereby (amongst other conditions) the defendant bound himself not to deal on his own account, in any such articles as were sold and purchased by him, in his capacity of manager, for the complainants. The bill proceeded to allege misappropriation of receipts, false accounts, and attempts, by defendant, to set up another shop at Barrackpore, for the purpose of dealing in the same articles as those dealt in by the Complainants, in contravention of the terms of the agreement, and prayed for an account, and also an injunction against further interference, by the defendant, in the complainant's business.

In the introductory part of the Ekrar above referred to, the defendant described himself as “a Basindah or resident of Jorosanko, in the station of Calcutta.”

The jurisdiction clause charged the defendant to be subject, on the ground of inhabitancy, and of his having so stated and represented himself in the Ekrar: also, that he had a family house in Calcutta, where some members of his family resided, and where he occasionally resided himself. The defendant having pleaded to the jurisdiction, the question now came on for hearing on evidence taken on both sides.

(a) This case is inserted out of order, simply for facility of reference.

Mr. *Clarke* and Mr. *Ritchie* in support of the plea. The evidence shows, that the defendant had left Calcutta for Serampore fifteen years ago, and taken his wife, and children, and family idols with him : and that he had gone down to Calcutta from time to time, but only when employed in the complainant's business ; and had never resided there. He had never contributed any thing to the family house at Jorosanko, but had, in fact, for a long time, lived separate in food and worship from his family. Besides he had conveyed away his interest in the Jorosanko house two days before the filing of the bill. This evidence, therefore, shows a discontinuance of residence in Calcutta for the last fifteen years. The fact of his going to the Jorosanko house, from time to time, when he came down on business, without keeping up any establishment there, does not amount to constructive inhabitation, the mere *right* or *power* of resorting to the house not being sufficient for that purpose.

Mr. *Dickens* and Mr. *Morton* contra. The evidence of the brother of the defendant, as well as that of other witnesses, clearly shows, on the contrary, that the defendant was in the habit of coming down to the Jorosanko house, and residing therein, and that he was only a temporary resident of Serampore. The evidence given by the defendant, for the purpose of showing that he had not been resident in Calcutta for fifteen years, is falsified by his own statement, in the commencement of the Ekrar, "that he was a *resident of Jorosanko*," at the time of its execution, which was only six weeks before filing of the bill. The defendant is tenant in common with his brothers of the Jorosanko house, and that of itself is sufficient to constitute constructive inhabitation—he would be subject to the rates and taxes, and participate in the privileges of such constructive inhabitation, and upon the principle of "*qui sentit commodum sentire debet et onus*," he ought to

1847.
In Equity.

—
PYNE
v.
MULLICK.

1847.
In *Equity*.

—
PYNE
v.
MULLICK.

be held subject to the jurisdiction. As to the alleged conveyance by him of his interest in the Jorosanko house, only two days before the filing of the bill, that is a mere suggestion; for no conveyance has been put in, nor evidence given of its existence. But, whether true or not, it seems to be a most suspicious circumstance, and has very much the appearance of evading the jurisdiction. *Bamasoonderee Dossee v. Rajcoomaree Dossee*, (a) and the cases there cited were referred to.

SIR L. PEEL, C. J.—In this case the question is one of jurisdiction. A plea to the jurisdiction has been pleaded and replied to, and evidence gone into on both sides. It appears to the Court, that the evidence on the side of the complainant clearly preponderates. The presumption from the facts is in favor of the continuation of that residence, which at one time clearly existed. The house belonged to the three brothers, who are presumably joint, till the contrary be established, and it is not denied that this dwelling house was their joint house, in which two of the brothers with their families constantly resided, and to which the other brother was occasionally in the habit of resorting as to his own house, and of sleeping there when in Calcutta. If it had been shown that he was a mere guest or inmate, having a residence elsewhere, and only sleeping in another man's house, during a temporary limited visit to Calcutta, the case would have been one which I should hold on principle, not to subject him to the civil jurisdiction of the Court; but this is not the case: and the defendant recently, in a paper which is in proof, described himself as resident in this very house, which, in my opinion, was an accurate legal description, though it was not his sole residence, nor a residence, indeed, which, latterly, was often actual. The presumption before mentioned, and

(a) See last case.

his own admission, decide the case in this conflict of testimony against him. But it was urged, that he had parted with his property in this house before the suit was actually commenced. The evidence, however, does not establish this clearly : the defendant might have shown, by secondary evidence, the character of this bill of sale, (which was not in his possession, nor under his control, and which the purchaser declined producing); that it was a sale out and out, and not merely an instrument, a bill of sale in form, or in effect a mere security ; and he might have shown (if the fact be so) a treaty or negotiation for the sale, preceding the execution of this instrument, which was not produced. I think strict proof should be required of a deed executed but two days before the actual institution of the suit, and the defendant's neglect to procure sufficient evidence, cannot entitle him to an issue.

In my opinion the general current of cases, decided in this Court, establishing what is termed "constructive inhabitancy" ought to be followed to their legitimate consequences. Those cases rest on established principles of law, and have the sanction of the authority of the most approved text writers, including Lord Coke, and of several decisions of the Courts at Westminster, in analogous cases. An actual presence is not legally requisite to constitute a man a resident. He may reside constructively, by his family, by his servants, by his partners. The word "inhabitant" used in the statute, is used without any words importing qualification on those points, which relate to the civil jurisdiction of the Court ; no such words as actually resident or actually inhabiting are found : or words implying in any way a strict personal presence. Residence necessarily includes inhabitancy, though the converse does not hold ; every man, therefore, who is legally resident in Calcutta is an inhabitant of it. If this Court, therefore, had limited inhabitancy, to a residence importing actual personal presence, it must have run into

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inconsistencies as to the legal definition of residence, and have arbitrarily adopted a limitation unknown to the law, without any evidence whatever that the Legislature meant such limitation to prevail. There is nothing in the reason of the thing to lead to a supposition that the Legislature meant, that if one, by his servants, carried on trade in a house of business of his own in Calcutta, contracted engagements, and incurred debts there, and resided there, by his servants or otherwise constructively, he should not be liable to the jurisdiction of the Court locally established there, merely because he himself constantly slept out of Calcutta: or that a party there resident, being his creditor, should be forced to sue such a debtor in a Court not locally situate there, and possibly distant. There is no reason, therefore, in the nature of the case, and none can be derived from the words of the Charter or Legislative Acts, to depart from the acknowledged general legal import of the words, "resident" or "inhabitant." If a house can truly be described in an indictment for burglary, as the dwelling house of A. in Calcutta, A. is legally resident in Calcutta, and if he be a resident he is an inhabitant—constructive residency or inhabitancy is not the construction of this Court, but of the law; every one who can claim a privilege by reason of inhabitancy, must be an inhabitant for purposes of charge—as in the cases of *Rex v. Hall*, 1 B and C. 123, and the case of *Rex v. Poynder*, 1 B and C. 179. The case of *Rex v. Adlard*, 4 B. and C. 779, whilst it upholds the general doctrine, supports and explains an exception on its particular and special grounds. The preamble of the 14th Geo. 2d, c. 10, is worth looking at, as explaining that the Legislature considered that the words "inhabitant and resident," (as founding the jurisdiction of the London Court of Requests) were meant to include constructive, as well as actual residence and inhabitancy. A reference to *Dalton's Office of Sheriffs: title Sheriffs Courts*, p. 384, and *title Sher-*

iffs Torne, p. 388, will show, that in the County Court, (an ancient Court of Civil Jurisdiction between party and party,) the Common Law held constructive inhabitancy and residence sufficient to support the jurisdiction of the Court: though in the Sheriffs Torne, (a Criminal Court) none were compellable to appear for the lands; “for this suit to the Sheriffs Torne, Lord’s Leet is a suit Royal, or which is always by reason of the person and not of any land,” whereas in the Court of Civil Jurisdiction, the County Court, as well as the Hundred Court, (carved out of the County Court,) “all the *inhabitants* within such liberty or hundred, *by reason of their tenements* there, shall be attendant, and one suit to the hundred.” There are certain cases in which liability to jurisdiction is a privilege of the debtor, as where he is exempted from the jurisdiction of a general and remote Court, as to certain limited claims, and subjected thereby to an inferior and cheaper jurisdiction. In such cases, liability to the jurisdiction of a Court, on the ground of inhabitancy or residency, would be claimed on the footing of privilege; but in general cases it would rather be viewed in the nature of a liability or charge. Viewed in this latter light, inhabitancy would fall within the authority of Lord Coke’s comment on the statute of bridges. It is not, however, necessary, to insist on this, as the decisions in this Court are within the principles of Common Law, on the subject of liability to be sued in a Court of Civil Jurisdiction, on the ground of constructive inhabitancy. I trust that the decisions of the Court, on any ground of jurisdiction, will never be extended, in any degree, beyond the fair reach of the principles, on which any particular branch of jurisdiction is founded, but I can see no reason for declining to give to the decisions, establishing constructive inhabitancy, their full application to new circumstances.

1847.
In Equity.

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Plea overruled.

where the defendant shall file a plea to the whole or part of a Bill, the plea shall be held good to the same extent, and for the same purposes, as a plea allowed upon argument; unless the plaintiff shall, within three weeks from the expiration of the time allowed for filing such plea, cause the same to be set down for argument; and the plaintiff shall be held to have submitted thereto." The three weeks allowed by this rule expired on the 9th of June; and it was not until the 11th of that month, when the complainants entered the plea with the Registrar, and obtained the order to set it down for argument for the ensuing Term. No replication had been filed although two months had elapsed. Although the plea goes in fact to the whole of the merits, still of itself, it is not enough to dismiss the Bill, but as the period has expired, during which the complainant was bound to take some further step in the cause, the plea, it is submitted, must now be taken as if allowed on demurrer; and the defendant Kissenpersaud is entitled to have the bill dismissed as against him. *Tarleton v. Barnes (a)* and *Roberts v. Jones (b)*

1847.
In Equity.

BEHARRIRAM
v.
SEWEMBERRAM &
KISSENPERSAUD.

Mr. *Prinsep* and Mr. *Morton* contra. There seems to have been some confusion in the practice, for the rule here is quite at variance with that in England. The rule governing the practice here is the old 28th, which simply requires the complainant to enter the plea within eight days, for argument.

[*The Chief Justice*.—Our rule appears to be the most stringent of the two. It says, "that the complainant shall, within eight days after having received notice of the filing of such plea, reply to the same, if he conceive the plea to be good, or shall enter the same with the Registrar, for argument, if he conceive it to be otherwise." If the complainant then does not enter the plea for argu-

(a) 2 Keen. 632.

(b) 7 Beavan, 266.

1847.
In Equity.

BEHARRIRAM
v.
SEWEMBERRAM &
KISSENFERSAUD.

ment within the time limited, he must be assumed to admit its validity.]

In this rule no penalty is attached for mere non-feazance on the part of a complainant. It is quite silent as to whether the plea, if not duly entered, shall be allowed as if argued on demurrer. It seems to be the duty rather of the defendant to move that the plea be allowed, if he is desirous to expedite matters.

[*The Chief Justice.* The complainants, by not setting down the plea for argument within the limited time, impliedly admit the validity of the plea in point of law. Were the defendant to set it down, he would waive the advantage he has gained by his adversary's neglect.]

There has been some misapprehension with regard to the interpretation of the rule. It seems to have been drawn up on a mistaken notion of what the rule was at home, and certainly is very vaguely expressed.

[*The Chief Justice.* The very fact of misapprehension should rather operate as an inducement on the party to avoid possible consequences, by coming in at once.]

This rule also provides, that the defendant shall give immediate notice of filing his plea. The 44th of Lord Lyndhurst's orders of Easter Term, 1845, (*a*) (which have not been acted on here) is silent as to notice, and dispenses with the entry of the plea, but gives either party liberty to set it down immediately, and the 49th (*b*) directs that if a plea is not set down or replied to within six weeks after *filing* thereof, it shall be held good as on argument. Under the old 28th rule immediate notice is necessary.

(*a*) Reported in 7 Beavan, xlii. (*b*) Ibid.
and in 14 Law Journal, Chan. rep.
289.

[*The Chief Justice.* Was any notice of filing the plea given here as required by the old rule ?]

1847.
In Equity.

BAHARRIRAM
v.
SEWEMBERRAM &
KISSENERSAUD.

The Advocate General.—I understand that notice was given, but there is no affidavit to that effect, it not having been considered necessary. The real question here arises under the 28th rule of 1842, which says nothing about notice.

SIR L. PEEL, C. J.—The real question is whether the complainant should be at liberty to contest the validity of the plea in point of law, or be driven to reply. We think the order of the learned Judge cannot stand, and ought not to have been obtained *ex-parte*. The question principally turns upon the late 28th Equity rule, (which is the same as the 35th of Lord Cottenham's of 1841, and introduced here in the time of Chief Justice Ryan). That rule is express. I confess I see no imperfection in it. Perhaps it may not be expressed so clearly and plainly as might have been done; the intent seems to be to introduce the same state of things as in England; and as the complainant has neither replied or set the plea down within the time limited, the rule might well be conceived to intend, that he was precluded from doing either afterwards. As to the want of notice under the old 28th rule, the complainant might have moved to take the plea off the file for irregularity, as the notice is required to be immediate, but his subsequent entry of the plea is an implied admission of notice having been properly given. As to dismissing the bill:—it may be that the defendant Kissenpersaud is in a position to do so, no step having been taken by the complainant to obviate the effect of the plea. But as the merits of the case cannot be arrived at without letting the complainant in upon terms, we think the bill should stand dismissed, unless he reply within a fortnight.

Order accordingly.

1847.
June 25.
Friday.

Plea Side.

GRIFFITHS v. SPENCE.

*Pleading
replication
De injuria and
New Assignment
when double.*

Trespass. The declaration alleged that defendant on a certain day assaulted the plaintiff, and then seized and struck him many blows, and dragged him along the ground and damaged his wearing apparel. *Second plea*—justifying the whole of the trespasses alleged, on the ground that defendant was possessed of a close wherein the plaintiff was unlawfully making a great noise and disturbance—*Third plea*.—Justification in defence of servants of defendant, on whom plaintiff had made violent assault. *Replication*—De injuria and new assignment of excess.

Held bad for duplicity and that plaintiff was confined to trespasses on one occasion.

TRESPASS. The plaintiff stated that the defendant theretofore to wit on the 20th day of April 1847 with force and arms &c. assaulted and beat the plaintiff and with great force and violence seized and laid hold of him and then with his hands and fists gave and struck the plaintiff a great many violent blows on and about his head and divers parts of his body and also then with force and violence threw the plaintiff down upon the ground and thereon pulled and dragged and caused the plaintiff to be pulled and dragged by the hair of his head and also then tore and damaged his clothes and wearing apparel; by means whereof the plaintiff was very much hurt and became sick.

Second plea.—As to the said several trespasses in the plaint mentioned, the defendant says that before and at the time when &c. the said defendant was lawfully possessed of a certain building called the Town Hall with the appurtenances situate and being at and in Esplanade Row in Calcutta, and which said building has divers to wit ten rooms and which said building at the said time when &c. was used by the defendant (amongst other purposes) as and for and was the dwelling house of the defendant who occupied one room therein as a sleeping room and the defendant being so possessed of the said Town Hall and the said sleeping room therein the plaintiff just before the said time when &c. to wit on the day and year in the plaint mentioned was unlawfully in the said Town Hall and the said sleeping room of the defendant therein and with force and arms was making a great noise and disturbance therein and then using violent and abusive language and continued so making such noise and disturbance and using such violent and abusive language of and to the defendant without the leave or

license and against the will of the defendant and during all that time greatly disturbed and disquieted the defendant and his family in the peaceable and quiet possession and enjoyment of the said Town Hall and of the said sleeping room therein whereupon the defendant then requested the plaintiff to cease making his said noise and disturbance and from using his said violent and abusive language, and to go and depart from and out of the sleeping room and Town Hall respectively which the plaintiff then wholly refused to do whereupon the defendant in defence of the possession of the said Town Hall and his said sleeping room therein at the same time when &c. gently laid his hands and caused hands to be gently laid upon the plaintiff in order to remove and did then cause to be removed the plaintiff from and out of the said sleeping room and Town Hall respectively as he lawfully might for the cause aforesaid which are the said several alleged trespasses in the introductory part of this plea mentioned and whereof the plaintiff has complained against the said defendant. Verification.

Third plea.—As to the said several trespasses in the plaint alleged, the defendant says that the plaintiff before the said time when &c. to wit on the said day and year in the plaint mentioned with force and arms &c. made a violent assault on one Hyder Ally one Juggroo and one Bundoo Sing then being the servants of the defendant and did then beat bruise and ill treat them the said Hyder Ally, Juggroo, and Bundoo Sing, and was continuing to beat and would then have further greatly beaten bruised and illtreated them if the defendant had not immediately defended them the said H. A. and J. and B. S., wherefore he the said defendant did then defend them the said H. A. and J. and B. S. so then being his servants as aforesaid against the plaintiff as he lawfully might for the cause aforesaid and in so doing did necessarily and unavoidably commit the said several trespasses in the

1847.
Plea Side.

—
GRIFFITHS
v.
SPENCE.

1847

Plea Side.

 GRIFFITHS
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said plaint and in the introductory part of this plea mentioned doing no unnecessary damage to the plaintiff on the said occasion and so the defendant says that the hurt and damage that then happened to the plaintiff and his wearing apparel were occasioned by the said assault so made by the plaintiff on the said H. Ally, Juggroo, and B. Sing, and in the necessary defence of them against the plaintiff which are the same alleged trespasses in the introductory part of this plea mentioned and whereof the plaintiff hath above thereof complained against the defendant. Verification.

Replication (separate to each of the pleas) *de injuria* and also new assignment that the plaintiff sued out his said plaint and declared thereupon not only for the said several trespasses in the introductory part of the said second and third pleas mentioned and therein respectively attempted to be justified but for that the said defendant at the said time when &c. with force and arms &c. assaulted the plaintiff and beat seized and laid hold of him and struck and threw him down and upon the ground and damaged his clothes as in the said plaint mentioned with more force and violence and in a greater degree and to a greater extent than was necessary for the purpose in the said 2nd and 3rd pleas mentioned in modo et formâ &c. which said trespasses above newly assigned are other and different trespasses than those in the introductory part of the said second and third pleas mentioned and therein attempted to be justified—concluding with a prayer of judgment.

Demurrer to both replications and new assignments :—
 For that by the mode of pleading adopted by the plaintiff he has unduly attempted after tendering a complete issue by traversing the pleas to raise a fresh issue on the record by new assignment. That the replications are double and complex. That the issue attempted to be aised by new assignment is immaterial inasmuch as

excess might be given in evidence under *de injuriâ*. That the new assignment is a departure, and in other respects informal and insufficient. Joinder therein.

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Mr. *Dickens*,—in support of the demurrer. These replications are bad for the causes assigned. The plaint alleges a single act of trespass, *on one day*, the whole of which each of the pleas covers. The plaintiff therefore is not at liberty to put in issue the whole trespass by the replication *de injuriâ*, and *further* new assign the same or different causes of action. If *de injuriâ* puts in issue the whole, it is clear that by proceeding to new assign the same causes of action thereby already put in issue the replication would be double; and if the new assignment were for other and different assaults than those mentioned in the plaint, then it would be a departure. The plaintiff can only adopt one or other of those courses here, as the trespasses are not alleged to have been committed on different days and times, or with a *continuando*. A similar replication was considered bad by *Parke B.* in *Thomas v. Marsh*. (a) And *Polkinhorn v. Wright* (b) is an express authority in point.

Mr. *Taylor* in support of the replications. First,—As to the cases cited by the other side, in that of *Thomas v. Marsh* the learned Judge who tried the cause merely threw out an observation, that such a replication might be demurrable, and the case of *Polkinhorn v. Wright* is distinguishable from the present. There the declaration alleged, that the defendant on a *certain* day assaulted the plaintiff; and to a plea justifying in defence of defendant's possession of a close, which plaintiff attempted forcibly to enter, *de injuriâ* was replied, and further, a new assignment of trespasses com-

(a) 5 Carr. and Pay. 596.

(b) 15 L. J. Q. B. p. 70.

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mitted on *other and different occasions* than those in the *declaration* and plea mentioned, which was clearly doubt-
 able as well as a departure. Here nothing is introduced
 into the new assignment, which is not already included
 in the plaint, and the statements as to excess bear special
 reference to the causes of action originally declared on.
 These pleas, although professing to do so, do not in
 reality cover the whole cause of action. Although a jus-
 tification involves a question of law and fact, yet the
 Court will notice whether the substance of the plea
 amounts to a justification in law or not. The plaintiff is
 entitled to treat the pleas (although purporting to be
 pleaded to the whole) as justification only of so much
 as the law allows to be justified under the circumstances.
 The plaint here specifies causes of action of such a na-
 ture, as neither are nor can be justified in this form of
 plea, which admits a *peaceable* entry in the first instance
 by the plaintiff. Both plaint and plea are general in
 their terms, and the replication makes that specific which
 before was general, *de injuriâ* merely covering so much
 of the trespass, in respect of which the defendant was
 entitled, in the language of the plea, *molliter manus im-*
ponere, and the new assignment of excess recapitulating
 the original causes of action *not* justified. The plea be-
 ing in fact divisible into what is justifiable and what is
 not. The authorities show, that whenever, in trespass
 or trover, a plea which professes to answer the whole of
 a count, in reality only answers a part, the plaintiff may
 show, by a new assignment, that defendant has not plead-
 ed to the whole of the real cause of action. *Vivian v.*
Jenkin (a), *Lambert v. Hodgson (b)*, *Monkton v. Shep-*
herdson (c). Besides the new assignment points to the
 trespasses as being the same, “whereof the plaintiff hath

(a) 3 Ad. & El. 714; 5 L. J. (c) 11 Ad. & El. 411; 9 L. J.
 (N. S.) K. B. 27. (N. S.) Q. B. 134.

(b) 1 Bing. 317. 1. L. J. C. P. 114.

in manner and form in the plaint complained against the defendant," *Page v. Hatchett* (a), is an authority expressly in favor of this replication.

The true test is whether the plaintiff under either one or other of these replications (*de injuriâ* or new assignment) could give evidence of the whole cause of action. It is submitted he could not; for it is manifest the former only puts in issue the justification; and the cases of *Oakes v. Wood* (b) and *Penn v. Ward* (c) decide that excess must be specially replied; which disposes of this objection in the demurrer. But the plaintiff is not obliged to give up any portion of his claim, he is entitled to split the plea, and (inasmuch as it does not, though it professes to do so) answer the whole, to reply as to so much *de injuriâ* and to the residue *excess*. This is similar to a case, when a right of way is traversed, and also a new assignment *extra viam* replied; such a replication was held good in the case of *Loweth v. Smith* (d), where Parke B. said time was as divisible as space, and, by analogy of reasoning, quality and quantity are equally divisible as time and space. And in *Worth v. Terrington* (e), which was an action of trespass for assaulting and imprisoning without reasonable cause, to wit for 24 hours, the plea justified the imprisonment for a reasonable time, being a portion of the 24 hours, and the plaintiff replied *de injuriâ* and new assigned the excess, the replication was held good. So here the plea can only justify what is by law justifiable, and that is *a part* merely of the cause of action. The plaintiff in his replication merely says "you the defendant can only justify to a certain extent, that justification I (the plaintiff) deny to be true; moreover I go for much more already stated in the plaint which in

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(a) 15 L. J. Q. B. 68.

(b) 2 Mees. & W. 797.

(c) 2 Cr. Mees. & Ros. 338.

(d) 12 Mees. & W. 582; 14 L. J.

Exch. p. 5.

(e) 13 Mees. & W. 781; 14 L. J.

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this form of plea, you (defendant) cannot justify, and which is therefore unanswered," and that forms the subject of excess. For that reason also the 2d plea is bad on general demurrer, for being pleaded to more than it really answers. *Crump v. Adny. (a)*

Points however of argument not having been furnished by plaintiff, this objection was not pressed.

SIR L. PEEL, C. J. We are of opinion that the demurrer must be allowed. The case quoted by Mr. *Dickens* of *Polkinhorn v. Wright* appears to us to govern this. The assault and battery alleged, is one single act of trespass, though consisting of several acts of violence ; it is not laid as committed at different times, nor as enduring for any continued length of time ; but the several acts are connected altogether. The 2d and 3d pleas apply, by their reference to the plaint, to the whole trespass complained of, and respectively justify it, and though the 2d plea appears to be demurrable as a plea of justification of all that it professes to justify, yet the introductory and concluding part alike show that it was not intended to be pleaded to part only of the whole trespass. The plaintiff must either admit the matter of the justifications and reply excess ; or deny the matter of the justification ; and if either of them were defective as a justification, he might have demurred to it, or to both, if defective ; but he cannot reply to a justification to one and the same indivisible trespass by denying the existence of the matters of fact constituting the justification, and say, at the same time, that the matters of fact existed, but that the license given by the law was abused. The case is one of indivisible trespass. The cases quoted for the plaintiff are distinguishable. Trespasses which are stated as continuing on different days are distinct trespasses in law on each day ; and the case of *Loweth v. Smith*, is a case of that

(a) 1 Cr. & M. 362.

description. The replication de injuriâ and the new assignment in that case applied not to the *same trespasses*. The case of *Worth v. Terrington*, as to the point of divisibility, seems to me to be opposed to a prior decision, viz. the case of *Aitkenhead v. Blades (a)*. I am not aware that in any preceeding case a continuing imprisonment for the same cause *during the same day*, was ever held divisible into divers imprisonments, (*both the subject of action,*) and though time is divisible, an imprisonment is not (by reason merely of the divisibility of the time during which it endures,) divisible in fact into separate imprisonments. The case of *Aitkenhead v. Blades* seems to be opposed to such division. The plaintiff in the case of *Worth v. Terrington* sued, in fact, for the alleged wrong continuing during the whole time of imprisonment, treating the whole imprisonment as wrongful, and his declaration applied to the whole time. If he had, in fact, meant to sue for the imprisonment during the shorter time, viz. that to which his new assignment applied, treating the excess over a reasonable time of imprisonment only, as the wrong of which he complained, then he should have explained that by a new assignment, and have waived the imprisonment during the first part of the time, as a matter not the subject of his complaint; but I am at a loss to see how upon principle, unless he were permitted at his discretion to divide the actual single imprisonment into several, he could both deny the justification as to the first part, and new assign as to the 2d part, of the same imprisonment during the same day. If he meant originally, as he clearly did, to sue for the wrong during the whole time, then he could not state truly that he meant to sue only for that during the minor time, and if he meant to sue for the wrong during the whole time, either his denial of the justification, or his replication of

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(a) 5 Taunt. 198.

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excess, if made out, would have served his purpose. If the justification had failed, the whole trespass would have been without any justification, and the excess would have made the whole imprisonment actionable as a trespass ab initio. But though this case does not satisfy my understanding, I bow to its authority, and if the present case were undistinguishable from it, my decision would be for the plaintiff. The Court however in that case pronounced on the ground that, as time was divisible as well as space, the continuous imprisonment was divisible into distinct acts of imprisonment, and therefore the general replication and the new assignment applied not to one and the same trespass. The case of *Page v. Hatchett* was in trover. As the plaintiff was not bound to prove the exact number of chattels which he alleged to have been wrongfully converted by the defendant to his own use, but might have recovered for a number differing from that alleged; the plea, though varying in the number of the chattels, apparently applied to all claimed, and justified the prima facie conversion by local matter of justification, and if there had been no new assignment in that case, and the evidence had established the justification as to all such as were so locally situate, the declaration, for want of the explanation of its true meaning, would have been understood as applying to that class of chattels alone. The replication in the nature of a new assignment applied itself to *different chattels* from those to which the replication de injuriâ applied, and it is an analogous case to trespasses in different parts of the same close; but the present case falls not within any of those cases, and the general principle must govern, that where one single indivisible trespass is complained of, and that not mistaken by the defendant, whether really or affectedly, the plaintiff cannot, in replying to pleas of justification, avail himself both of the common replication de injuriâ and of new assignment.

The dictum of Mr. *Baron Parke* in the case of *Thomas v. Marsh* is in accordance with our decision. That case was quoted on the argument of the case of *Loweth v. Smith*, and the learned Baron indicated no change of opinion, though he distinguished *Loweth v. Smith*, as one trespass continuing in point of time, and therefore in the opinion of the Court of Exchequer divisible.

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Demurrer allowed ; with liberty
to plaintiff to amend.

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MOONSHEE ABDOL HULLEIM

vs.

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Monday.

—
Detinue.
Pleading.

DETINUE, for Cow hides delivered by the plaintiff to the defendant, to be re-delivered on request.

Third plea—As to parcel of the said goods and chattels in the plaint mentioned, to wit 2000 of the said Cow hides, the defendant saith, that the plaintiff, at the times respectively of delivering to the defendant the said Cow hides, borrowed and received from the defendant certain monies, to wit Co.'s Rs. 1,150 altogether, repayable to wit on demand, and that the said last mentioned Cow hides were delivered and deposited by the plaintiff to and with the defendant under a certain agreement, whereby it was agreed, by and between the plaintiff and the defendant, that the latter should, in case of default, sell the said Cow hides at the bazaar price, and should

To detainue for cow hides, defendant pleaded in substance ;—" That the goods were deposited with him on account of a loan to plaintiff repayable on demand under an agreement empowering defendant, in case of default in repayment, to sell at the Bazaar price, and to charge commission, and retain the same, as well as the principal, out of the proceeds of the sale." The plea then averred, that, after demand of the sum due and refusal to pay, defendant contracted to sell at the Bazaar price.—
Replication " That

after demand of payment and default, and before defendant entered into any bidding agreement to sell, plaintiff tendered a large sum to wit Rs. 1500 in full satisfaction of the sum due, and then requested defendant to re-deliver the cow hides, which defendant refused.—*Demurrer*, in substance.—That the replication did not show, that the authority to sell was revocable after demand of payment and default thereon ; or after defendant had entered into contracts to sell ; or that the authority was revocable at all, without the consent of defendant. And also ; that the statement as to tender " of a sum to wit Rs. 1500 in full satisfaction of the sum due " was informal.

Held—as to both objections, well pleaded.

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receive aurut-darree or agency commission at the rate of one rupee per corge, and should retain his said principal monies, so lent and advanced as aforesaid, and the said agency commission out of the proceeds of the sale of the said Cow hides ; and that in the mean time the said Cow hides should remain in the godowns of the said defendant. And the defendant avers, that the said Cow hides did remain in his said godown under the said agreement, and that afterwards and before the commencement of this suit, to wit on the first day of March, 1847, a large sum, to wit Co.'s Rs. 1500, in respect of the said advances, was due to the defendant, and that he the defendant then demanded payment thereof, of and from the plaintiff, and the plaintiff then neglected and refused to pay the same or any part thereof ; whereupon the defendant afterwards, to wit on the day and year last aforesaid, contracted to sell the said Cow hides at a certain rate or price, to wit Co.'s Rs. 7 per corge, being the Bazaar price, as he lawfully might under the said agreement and for the cause aforesaid : wherefore the defendant did and doth detain the said Cow hides in the introductory part of this plea mentioned from the plaintiff. Verification.

Replication to third plea—That after the delivery of the said Cow hides in that plea mentioned to the defendant, and after he the defendant had demanded payment of the sum due to him as therein mentioned, and before he the defendant had contracted or entered into any final or binding agreement or engagement to sell the said Cow hides in that plea mentioned, or any of them or any part part thereof, and before the commencement of the suit, to wit on the first day of March, 1847, he the plaintiff was ready and willing and then tendered and offered to pay to the defendant a large sum of money, to wit the the said sum of Co.'s Rs. 1,500, in full satisfaction and discharge of the said sum then due from the plaintiff to the defendant, as in the said third plea mentioned, and

then requested the defendant to deliver up and return to the plaintiff the said Cow hides in the said plea mentioned, but he the defendant then neglected and refused so to do, and kept and detained and still doth detain the same, in manner and form as in the plaint alleged. Verification.

Demurrer to replication to third plea—That the plaintiff in and by his said replication admits that default was once made by him in payment of the said advances upon the same being demanded, and that he does not show that the said authority to sell was revocable after such default had been made, or after contracts had been entered into by the defendant to sell, whether absolutely binding or not, or that it was revocable at all, without the consent of the defendant, the said authority being an authority coupled with an interest. And also that the replication does not state that the whole sum justly due to the defendant for and in respect of the said advances and under the said agreement, was at the said time when, &c. or at all tendered by the plaintiff to the defendant, but only that some monies, the amount whereof is laid under a videlicet, were tendered as and for the full sum, at some indefinite period after default once made, and that it is consistent with such statement, that the amount tendered, although tendered as and for the full amount due, may not have really amounted to the sum justly due and claimable, or if the replication be intended to amount to such statement it is argumentative in that behalf.

Mr. *Morton* in support of the demurrer—As to the last objection taken,—the replication contains no statement that the sum actually due in respect of advances was tendered, but it is simply alleged that the defendant tendered a certain sum as and for the sum really due. This renders it difficult for the defendant to take issue. The sum tendered might have been smaller than that

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justly due. If the defendant traverse the fact, that plaintiff did tender the sum mentioned in the replication, then an immaterial issue is raised, which the plaintiff is not bound to prove, the amount being laid under a videlicet. But if the tender had been alleged to have been made in full satisfaction of all that was due, issue might and would have been joined.

[*The Chief Justice*—The plea does state that the sum tendered was in full satisfaction.]

That it was tendered in satisfaction certainly; but a smaller sum may have been tendered in satisfaction of a larger, which would make it a bad tender. The replication states that a certain sum, to wit the Rs. 1,500, was tendered as and for the sum due; the objection to which is, that this averment would be supported by proof of a nominal sum merely having been offered for that actually and justly due. But the substantial questions for consideration are first, whether the authority to sell was revocable—and 2dly, If so—was it revocable after default made by the party himself? The agreement stated in this plea provides that all the advances made under it should be repayable on demand—such demand is alleged to have been made on the plaintiff, and that he neglected, notwithstanding, to repay—and that, in consequence of such default, the defendant contracted to sell goods deposited. The replication alleges merely, a tender of the supposed amount due, before any contract or agreement to sell to other parties had been actually perfected and become binding on the defendant. This is a power coupled with an interest and therefore not revocable at the option of the grantor of it. The real point is whether, (default having been made by plaintiff in repayment, after demand made by defendant,) the authority to sell does not become irrevocable, and entitle the latter to sell at all events. Without an actual sale, the defendant would not be entitled to any commission and a part of the consi-

deration for lending the money was, that he should have the power of sale, and deduct the principal monies due, out of the proceeds of such sale, together with his commission.

[*The Chief Justice*—The plea admits the principal monies to be repayable on demand. According to your argument, defendant would be entitled to claim commission as a remuneration, although the goods had remained only one hour in his custody. Nothing is said in the agreement as to the defendant's being entitled to commission at all events.]

It is not because the money is repayable on demand that defendant is disentitled to commission. If he had no right to any commission, except such as arose upon the sale, the agreement would still be binding. Here nothing is said about interest or charges; it is therefore manifest that the very essence of the consideration for the loan, was the commission on the sale, coupled with the right to deduct out of the proceeds, the principal monies for which, otherwise, the defendant would obtain no remuneration whatever. The case is analogous to that of Auctioneers, or Commission Agents, making advances to parties in respect of certain goods, at the same time stipulating (as a part of the consideration) that they shall have the sale of the goods.—In such cases a right to sell at all events exists. The commission is for their trouble in selling. The argument here is, that where advances are made in respect of goods deposited, with a power of sale, in case of default in repayment—after such default, the power becomes absolute, and there can be no revocation of it.

Mr. *Ritchie contra* was not called on.

SIR L. PEEL, C. J. We are of opinion that this demurrer cannot be sustained. The plaint is in detinue

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for Cow hides ; it is pleaded that the plaintiff borrowed of the defendant a certain sum repayable on demand ; that it was agreed, that, in case of default, the defendant should sell the goods at the bazaar price ; and receive a commission on the sale at a certain rate, and repay himself his advances and commission out of the proceeds : it then alleges a demand and default, and further that, after the default, the defendant contracted to sell the goods, and so justifies the detention. The replication is, that after the default, and before the contract, the plaintiff tendered all that was due. The form of this latter averment was objected to, as indirect and argumentative, but we think it sufficiently explicit, and in the usual form of replying a tender. But it was urged on the merits that the defendant had a power, coupled with an interest, and that it was not a revocable power ; that there was no reservation of interest on the loan ; and that, unless the defendant could insist on a sale, he would have lent his money for nothing, and have had to give his godowns for the keeping of the pledge for nothing. The case, however, cannot be considered now, as if it were before a court, which, taking into consideration evidence of usage and course of dealing, might construe a mercantile contract in some special and peculiar sense. A man may, from various motives, lend money not on interest ; a pledgee cannot without contract, recover for warehouse room for keeping the pledge in his own warehouse ; and one who does lend money for his own advantage on a pledge, may make his remuneration contingent. There is nothing therefore shown on the face of the pleadings to take the case out of the common rule, that a pledge of chattels, with a power of sale, is redeemable after default as well as before. The plea is framed on a construction of the contract, inconsistent with the present argument in support of the demurrer. It admits the right to redeem after default, and alleges a

contract for sale formed subsequently as showing that the redemption was too late. Otherwise, this averment would be wholly surplusage, if a sale could be made at all events on a default. The argument of the defendant necessarily implies that there must be a sale for the remuneration of the defendant for his loan. But if no default had been made, the plaintiff's loan would have been without remuneration, and the argument, therefore, proves too much, that the contract must necessarily be construed so as to give a remuneration. If the defendant were to receive a remuneration in any event of the contract, then it would be necessary to uphold the power of sale without a default. If the contract were that in consideration that the defendant would advance money to the plaintiff, the plaintiff agreed to deposit goods with the defendant to be sold, and to give him the sale of those goods, by way of remuneration, and that the mode of remuneration agreed upon was a commission on the sale, then the contract should have been so pleaded. The argument against the replication in support of the demurrer assumes a contract inconsistent with that on which the plea to be a good plea must be supposed to be founded. It is said that it would be unreasonable to suppose that the defendant lent his money without interest, and took a pledge, without some remuneration in some mode. He may not have considered it probable that the goods could be redeemed; or he may not have fully considered the consequences of his contract. On the other hand, this difficulty is not adverted to by the defendant, viz; that as the defendant lent his money payable on demand, he might have demanded his money the same day or the next, and, on a default to repay it, have insisted on a right to sell the property, though no interest worth mentioning would have been payable on a reservation of interest, and though the plaintiff was ready with his money to redeem shortly after a default. It is

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sufficient, however, to state that the true construction of the plea is that of a pledge with a power of sale, and a contract of sale by the pledgee under his power: to which the replication is, that before such contract, though after a default, all that was due was tendered; the legal result from these facts is that the pledge was redeemable and the detention actionable.

Demurrer overruled, with liberty to
defendant to rejoin.

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FRAMJEE RUTTONJEE,

vs.

NUSSEERWANJEE RUTTONJEE.

June 28.
Monday.

*Pleading
malicious arrest
averment of malici-
ous intent
sufficiency of*

CASE for malicious arrest.—The plaint stated, “that by the practice and rules of this Court, on the *Plea Side*, the number of days within which special bail must be perfected, are specified in every writ of *Capias*—that 8 days after execution thereof, are specified in that behalf in every such writ intended to be executed within the limits of the Town of Calcutta, or within 10 miles thereof; and a greater number of days specified in every writ intended to be executed at a greater distance from Calcutta than 10 miles.—That Moulmein is a place within the limits of the Presidency of Fort William, but distant from Calcutta greatly more than 10 miles, to wit, 1500 miles; and that much more than 8 days, to

The plaint (after setting out the Practice of the Court as to the time allowed on writs of *Capias* for perfecting special bail), alleged that the defendant sued out a writ of *Capias* against defendant requiring him to put in bail within 8 days after execution on him of the writ—It then averred—“that such writ was intended by the Court to have been executed, and ought to have been executed, within Calcutta, or 10 miles thereof. Yet that defendant wrongfully, maliciously, and unjustly contriving and intending to imprison, harass, and oppress plaintiff, and to cause and procure him to be arrested and imprisoned at a great distance to wit 1500 miles from Calcutta, viz. at Moulmein, and to prevent plaintiff from having time to put in bail, and to deprive him of the opportunity and power of putting in bail within the period limited; afterwards to wit &c. wrongfully and maliciously delivered the writ to the sheriff for the purpose of being executed at Moulmein and arrested him thereunder at Moulmein.—*Demurrer* on the ground (among others) that the plaint contained no averment that when the writ was delivered to the sheriff, defendant was not actually resident in Calcutta or within 10 miles thereof; or that the writ could not have been executed within those limits—that therefore the allegation of delivery of the writ to the Sheriff for a wrongful and malicious purpose was but inferentially alleged—*Held* that the malicious, intent and circumstances showing it were sufficiently averred.

wit 60 days at least, are required, to enable a person arrested at Moulmein, to communicate with Calcutta, and to perfect special bail: and that it is the usage and practice of this Court, in issuing writs of *capias* intended to be executed in Moulmein aforesaid, to specify in the said writ, that the period of 60 days shall be allowed, for putting in special bail thereof. That theretofore, to wit on &c. the defendant, alledging and claiming certain monies to be due from the plaintiff to him the defendant, caused to be sued out and prosecuted from and under the seal of this Hon'ble Court, a writ of *capias* commanding the sheriff to take the plaintiff, if he should be found within the Provinces, &c. subject to the Presidency, and him to keep safely, until he should have put in bail, or made deposit according to law, &c."—The plaint then proceeded to set out the writ in the usual form, and, after stating that the plaintiff was thereby required to put in special bail within 8 days after execution on him of the said writ, averred "that the said writ was intended by the said Court to have been executed, and ought to have been executed, within the limits of Calcutta or 10 miles thereof, and not elsewhere; yet the defendant, well knowing the premises, but wrongfully, maliciously, and unjustly contriving and intending to imprison, harass, and oppress the plaintiff, and to cause and procure him to be arrested and imprisoned at a great distance from Calcutta, namely, at Moulmein aforesaid, and to prevent the plaintiff from having time to put in bail (which he, the plaintiff, would have been able to do, and would have done, if a reasonable time had been allowed in that behalf,) and to deprive him of the opportunity and power of putting in bail, within the period limited in that behalf; afterwards to wit &c. wrongfully and maliciously delivered the said writ to the said sheriff, for the purpose of being executed at Moulmein, and caused and procured the plaintiff to be arrested by his body under the said

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writ at Moulmein aforesaid; and thereunder to be detained and imprisoned there for two days, and thence to be taken and brought to Calcutta, and there to be imprisoned, to wit for four days, until the plaintiff was subsequently discharged; on filing common bail"—concluding with an allegation of special damage.

Demurrer—assigning for cause. That it is no where averred or shown in the plaint, that when the writ was delivered to the sheriff to be executed the defendant was not actually resident in Calcutta or within 10 miles thereof, and that it is not stated that the said writ could not have been executed upon the defendant within Calcutta or 10 miles thereof, and that therefore the allegation of the delivery of the said writ to the sheriff for the wrongful and malicious purpose of being executed at Moulmein, is but argumentatively and inferentially alleged. And also that the plaint is prolix and informal in the averment concerning the intention of the Court, as to the place of execution of the said writ, and the discharge of the defendant on filing common bail, which are wholly impertinent and immaterial.

Mr. *Dickens*, in support of the demurrer. This must be admitted at all events to be a case of the first impression; and although it is not contended that the novelty of the form of action is conclusive against its being maintainable, it certainly forms a *prima facie* argument. The plaint discloses no cause of action, for it does not clearly show whether the *capias* issued was regular or irregular. If it was irregular, it lies upon the plaintiff in this action to show in what the irregularity consisted. If it was regular, there is no precedent for such an action as this, when the defendant has done nothing more than the law allowed him to do. The motive, however malicious, which actuates a man in doing a strictly legal act, gives no right of action. The illegality of the motive cannot

illegalise a lawful act. Here it is not stated that the debt was not due, nor even that the plaintiff (the defendant in the former action) was not in Calcutta at the time the writ of *capias* was sued out. As to the arrest itself, that was the act of the sheriff, not of the party who sued out the writ.

[*The Chief Justice*—The plaint certainly ought to show that it was this defendant's intention that the writ should have been executed in Moulmein. If the plaint does not show that, it is defective ; because, if he merely delivered the writ to the sheriff, even if he were actuated by the secret hope that the sheriff would make a blunder, it would give no right of action.]

Precisely. And the consequences, which are here stated to have resulted, are by no means the necessary legal consequences. If a writ is delivered to the sheriff which ought to be executed only within Calcutta or ten miles from that place, is the sheriff bound to execute it elsewhere? If he is, where is the illegality or irregularity? If he is not, the arrest is not the necessary consequence of the delivery of the writ to him, but is a voluntary proceeding on his own part, for which (if improper) an action may perhaps lie against him. But it would be very difficult to contend, that, in such a case as the present, any action, either of trespass or case, would lie against the sheriff. In short the test is, whether the process was regular or irregular, and whether the sheriff could be sued.

[*The Chief Justice*—That does not seem the test at all. Actions for the abuse of *regular* process are far more common than actions for suing out irregular process ; and, in point of fact, the injury is usually much more substantial in the former case. Take for example, the case of a *capias* maliciously (yet regularly) sued out where no debt is justly due.]

If the alleged debt is not due, there must be a false

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affidavit, and therefore a clear ground of action. But here the action for the debt is still pending, and indeed the debt is not denied upon the plaint. And it is consistent with all the averments there stated that the plaintiff (the former defendant) was actually a resident inhabitant of Calcutta at the time the *capias* was sued out. The plaint ought to have negatived this. If the plaintiff was then resident in Calcutta, what possible wrong was done in suing out the writ?

Mr. Morton contra cited *Grainger v. Hill* (a) *Heywood v. Collinge* (b) and *Crozer v. Pilling* (c) and was then stopped by the Court.

SIR L. PEELE, C. J. I think that the averments contained in this plaint show a good cause of action. I thought at first the intention of the defendant was not stated with sufficient distinctness. But I find that the malicious intent, and the circumstances showing it, are sufficiently averred. By the practice here upon bailable process 8 days are allowed between the teste and return of the writ of *capias*. On demurrer the delivery of the writ to the sheriff for the purpose alleged is admitted. If then, a party (in the language of the plaint) "contriving and intending to harass and injure the plaintiff, and to cause him to be arrested and imprisoned at a great distance from Calcutta, viz. at Moulmein, so as to prevent him from putting in bail, wrongfully and maliciously deliver the writ to the sheriff for the purpose of its being executed at Moulmein, and cause the plaintiff to be arrested thereon at Moulmein," he is guilty of abuse of process. The wrong complained of is not the original

(a) 4 Bing; N. C. 212, 5 Scott, (c) 4 B. & C. 26, 6 D. & Ry.
 561 & 7 L. J. (N. S.) C. P. 85. 129 & 3 L. J. K. B. 131,
 (b) 9 Ad. & El. 268; 1 P. & D.
 202 & 8 L. J. (N. S.) & B. 6.

suing out of the writ, but the delivery to the sheriff, for the purpose of being executed at Moulmein, of a writ which was intended by the Court to be executed in Calcutta: the delivery for such purpose being alleged to have been made with a malicious intent. It is immaterial therefore where the plaintiff in this action was when the writ was sued out. There will be judgment for the plaintiff, unless the defendant amend upon the usual terms.

Leave to amend, upon payment
of costs, otherwise Judgment
for the plaintiff.

In Equity.

MUTTY LOLL SEAL v. JOYGOPAUL CHATTERJEE.

MOTION (on Notice)—“That the Decree made in the above Cause on the 25th day of March 1846, and the order, bearing date the 2nd of November 1846, be respectively set aside for irregularity with costs:—and that it be referred to the Master to take an account of what was due and owing by the defendants to the complainant for principal, interest, and costs on the mortgage securities; and also of the rents, issues, and profits received by the complainant since his possession of the mortgaged premises:—and that upon payment by defendants of what might be reported to be due from them to complainant, by a day to be appointed by the Master, the mortgaged premises might be reconveyed.

The defendant Joygopaul, (being entitled under his father's will to one undivided fifth share of a certain talook), purchased from two of his brothers their undivided fifth shares, and then mortgaged the same, together with his own share to them, for the purpose of paying the purchase money.

The mortgage was subsequently assigned to the com-

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July 1.
Thursday.

*Mortgage
Foreclosure*

Receipt by Mortgagee of rents and profits—Account by Registrar—Decree thereon—Irregularity of.

A Mortgagee, (having previously entered into receipt of the rents and profits of the mortgaged premises) took the usual account of debt and interest by the Registrar, who appointed that day six months for payment thereof. The Defendant having made default, the decree for foreclosure was made absolute. *Held*, that such decree was erroneous, and that there should have been a reference to the Master to take an account of the rents and profits received by the Mortgagee.

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plainant Mutty Loll Seal, who, in August 1845, filed a bill of foreclosure against the defendant; and, contemporaneously therewith, brought an action of ejectment in respect of the same mortgaged premises. This action being undefended, the plaintiff obtained a verdict, and judgment *ex parte*; and thereunder, about the early part of January 1846, entered into possession of the mortgaged premises, and the receipts of the rents and profits thereof. The bill of complaint was taken *pro-confesso* in the month of February following; and on the 25th March, the complainant obtained a decree of foreclosure, whereby (among other things) it was ordered that defendant should that day six months pay to complainant what might be found due upon taking the usual account by the *Registrar*. The Registrar certified that the sum of Co.'s Rs. 6,831 was due, for principal, interest, and costs in respect of the mortgage, and directed the same to be paid in the mode specified by the decree. No application was made by the defendant for an extension of the time for payment, but on the 15th of September, (10 days before the expiration of the prescribed period) the defendant's Attorney wrote a letter to the complainant's Attorney to the following effect:

Dear Sirs,

In this case, your client, in December last, obtained possession of the talook and premises mortgaged to Gungadhur Chatterjee and Hurreehur Chatterjee, and has, since then, been in the receipt of the rents and profits, for which he must of course account to the defendant, who is prepared to pay the amount of debt and costs, less what your client has collected. I shall, therefore, feel obliged by your furnishing me with a statement of what is actually due to your client.

Yours faithfully,

W. N. Hedger.

To Messrs. Higgins and Son.

15th September, 1846.

To which the following answer, dated 24th September, 1846, was returned:—

Sir,

With reference to your letter of the 15th instant, we beg to annex a copy of an account, exhibiting a balance in favor of the complainant of Co's. Rs. 7,967-15-4 on receipt of which sum the complainant will be ready to deliver up possession of the mortgaged premises to your client, and to execute the necessary reconveyance, on your preparing such reconveyance, and submitting the same, through us, for approval and execution by the complainant, and paying our costs for the same.

Yours obediently,

To *W. N. Hedger, Esqr.*

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The day after the receipt of the above letter, viz. on the 25th of September 1846, at the verandah of the Court house, being the time and place appointed, one John Hughes attended on behalf of Mutty Loll Seal, but neither the defendant nor any one on his behalf then appeared to pay the sum stated to be due in the certificate of the registrar. On the 16th of November 1846, the complainant obtained the final order for making the decree nisi for foreclosure absolute; and on the 26th of May 1847, notice of motion was given to set aside the last mentioned decree.

The affidavit in support of the motion, (in addition to the above facts) stated that the mortgaged premises were worth five times the amount of the principal sum advanced, and that the complainant, since entering into possession, had received large sums of money in respect of the rents and profits thereof, for which he had not accounted to the defendant, nor credited in the account made up and certified to be due by the registrar; and that he still continued in possession. That the defendant believed the complainant's claim against him to be

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considerably diminished by such receipts, and that he had used every exertion to raise by the appointed day a sum sufficient to repay the complainant (after proper deductions) but had been unsuccessful.

Mr. *Taylor* and Mr. *Ritchie* in support of the motion cited *Renvoise v. Cooper* (a) *Jones v. Creswicke* (b) and the cases of *Nanfan v. Perkins*, *Crompton v. Earl of Effingham*, *Joachim v. Macdonal*, *Lee v. Heath*, and the other cases there cited.

Mr. *Clarke*, Mr. *Dickens*, and Mr. *Morton*, contra. An order by which a matter has been referred to the registrar cannot be modified by directing a reference to the master. The affidavit of the gomastah (who collected the rents on behalf of the complainant,) clearly shows, that the account delivered to the defendant's attorney (which was not disputed, and therefore may be taken to be acquiesced in) was correct, and that the payments for government revenue, together with the costs, have greatly exceeded the receipts and collections, so that the complainant has derived no advantage or profit from his possession of the mortgaged premises. It is also stated that the talook in question, (of which the mortgaged premises form a portion) in consequence of default on the part of the other shareholders in payment of the government revenue, has been since sold on that account, and the purchaser put into possession. Besides the defendant is now too late in his application, after having been served with full notice of all the proceedings adopted in the suit by the complainant. At all events the decree cannot be altered on a mere motion. The defendant should have filed a supplemental bill in the nature of a bill of review. The cases cited are distinguishable from the present.

(a) 1 Sim. & St. 364

(b) 9 Sim. 304 ; 9 Law. J. N. S. Ch. 113.

SIR L. PEEL, C. J. We think that so much of this motion as asks to set aside this decree, ought to be granted. A reference to the registrar is merely for the purpose of computing the amount of the principal debt and interest. It seems that previous to the reference to the registrar, the mortgagee had taken possession of the mortgaged premises. It has been contended, that this is not material, because the mortgagee had not obtained any actual profit or advantage from his possession. But the mortgagor is not necessarily cognisant of that, nor can the fact be presumed to be within his knowledge. It appears that *some* rents and profits were received by the mortgagee, subsequent to his possession; whether large or small, it is immaterial to consider. His possession entitles the mortgagor to an account. The bill in this instance was taken pro-confesso; and in such a case it behoves a complainant to be strictly regular in his proceedings. It is his duty to obtain a proper order from the Court. When the mortgagor entered into the receipt of the rents and profits, it became necessary that a reference should be made to the master to take an account of such receipts and profits, as that is a proceeding not within the scope of the duty or authority of the registrar; for the fact of such receipts rendered a computation by the latter inapplicable to the case. It has been decided, that where there has been a receipt of fresh rents and profits by a mortgagee in possession, subsequent to the taking of an account by the master, there must be a reference back to him, for the purpose of ascertaining the amount of those subsequent receipts. The only question is whether there has been a waiver of the defendant's right. We think not. The letter of the 15th Sept. proceeds upon the notion that the mortgagor had a right as of course to an account. When the account required is given, the defendant is silent, and takes no notice of it, and that to some slight extent may be

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presumed to be acquiescence ; but he clearly does not thereby acquiesce in the *correctness* of that account. No such presumption should be made against a party without manifest grounds for so doing. There is nothing here to preclude the defendant from his right to an account. It appears to us therefore that the decree was erroneous and defective. It has been argued that the matter should have been brought forward by a supplemental bill in the nature of a bill of review. We do not consider the present case to consist of supplemental matter at all ; nor subscribe to the argument that this decree cannot be set aside by motion. It was taken pro-confesso, which proceeds upon process of contempt. The only remaining question is upon what terms the defendant is to have the relief asked for. There are circumstances here which disentitle him to costs. It would have been but proper and candid on his part to have given the complainant notice of his intention to dispute the account. Independently of this, a considerable lapse of time has taken place since the order was made absolute. We therefore refuse costs. If this had been a question merely of *irregularity*, this application perhaps might have been too late. But this is a case between mortgagor and mortgagee. The precise value of the estate is not mentioned, but there is reason to suppose it is much more valuable than the debt. In cases between mortgagor and mortgagee the Court is always desirous to give the party simply what he contracted for ; and so long as this decree of foreclosure stands, it must operate as a bar.

Decree set aside without costs.

In Equity.

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RAJINDRO MÜLLICK *v* RAMGOPAUL CHUND and others.July 1st.
Thursday.

INJUNCTION moved for (on motion) to restrain the defendants in equity from proceeding to trial in an action of ejectment (brought by them against the plaintiff in equity) until answer or further order.

*Practice ;
injunction to
stay trial at law.
Bill of discovery.*

In the case made by this motion, the injunction goes until answer, and cannot be opposed by affidavit.

Mr. *Dickens*, Mr. *Morton* and Mr. *Ritchie* appeared in support of the motion, which was supported by affidavit, stating the bill to have been filed for discovery, as well as to ascertain the existence of certain deeds relative to the property in question, without which discovery the defendant alleged he could not safely defend the action at law.

Mr. *Cochrane* and Mr. *Taylor* contra urged, that the complainant had not on his own affidavit disclosed a case for the allowance of the injunction, and proceeded to read affidavits in answer.

It was objected that affidavits could not on this motion be read as an answer and *O'Dowda against Rajah Dabee-kistno* (a) was referred to as an authority to that effect.

PER CURIAM. (b) It is clear that when a party files a bill of discovery, and states he cannot go safely to trial without it, the injunction to stay trial should go until answer, when the other side can move to dissolve; and affidavits cannot be read in opposition.

(a) Montriou's Sup. Ct. Decisions, 66.

(b) Sir L. Peel, Sir H. Seton, and Sir J. Grant.

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*In Equity.**July 1st.
Thursday.*

BEHARRYRAM and another

vs.

SEWEMBERAM and KISSENPERSAUD.

*Practice—Pleading
28th Eq. rule
Amendment of bill
after plea allowed.*

After plea allowed, the Complainant will not be allowed to amend his bill, without stating fully the proposed amendments in his notice of motion.

MOTION, for an order “that the complainants have leave to amend their bill of complaint generally; and specially as against the defendant Kissenpersaud, upon payment of taxed costs of his plea, &c. and that so much of the order of this Court, whereby it was ordered that the bill of complaint should stand dismissed with costs as against the defendant Kissenpersaud without further order, unless the complainants should reply to the said plea within a fortnight from the date of the order, be discharged.” (a)

The affidavit in support of the motion stated “that the amendments necessary, were statements to the effect that the defendant Kissenpersaud had personally taken part in the transactions and matters in the bill stated, to such an extent, or in such a manner, as to make himself personally liable in respect thereof to the complainants, whether as partner or agent.”

Mr. Colville (Adv. G.) and Mr. Taylor shewed cause. This motion is quite contrary to the practice. The plea in this case must be treated as if it had been argued and allowed on argument and comes clearly within the scope of the 28th equity rule. (b)

The practice as to amendment of bills after plea filed, and after argument of plea is very different. In the former case amendments may be made upon payment of certain costs, but in the latter special grounds must always be stated. Treating this, then, as a plea allowed upon argument, the amendments required to be made

(a) Vide ante, p. 83.

(b) Sup. C. Eq. Orders, 8.

must be before the Court, in order that they may be enabled to ascertain whether the proposed amendments do or not involve the same facts as those disposed of in the plea. *Taylor v. Shaw*, (a), *Barnett v. Grafton* (b) *Carleton v. Strange*. (c)

The authorities cited also show that after plea allowed, the complainant cannot by amendment set up an entirely new case in his bill, for the purpose of avoiding the effect of the plea. In this instance, the attempt to do so is obvious. The proposed amendment seeks to charge Kissenpersaud either as agent *or* partner. The latter liability has been disposed of by the plea which denied the existence of any partnership between Kissenpersaud and the other defendants; and as to the former, that creates a species of liability very different from what was originally contemplated or charged.

Mr. *Prinsep* and Mr. *Morton* in support of the motion. All the cases cited are instances where the plea was actually argued and allowed. In the present instance the complainants simply submitted to the plea as it stood without argument. What is contended for on the other side is admitted to be of force, so far as the statement as to partnership is concerned. We complain of a fraud having been practised on us by the firm in Calcutta, who are our agents; the defendant Kissenpersaud is the gomastah of that firm, and we contend, that he is particeps criminis and equally liable. Taking it however as a plea after argument it is not uncommon to allow a party to amend the grounds.

SIR L. PEEL, C. J. The cases cited govern this. The plea must be considered as allowed after argument. It is contended that the sub-agent of the agent is liable. If

(a) 2 Sim. & St. 12.

(b) 8 Sim. 72.

(c) 1 Turner, 23.

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so, they would be partners in the agency, and that would involve the question of partnership. But the liabilities of an agent and those of a partner are quite different. This is precisely a case in which the Court ought to have the circumstances specially stated, in order to enable them to ascertain whether this defendant's liability was merely a civil one, incurred within the scope of his authority; or whether arising out of a fraudulent combination.

Application refused with costs.

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Thursday.

In Equity.

RUSSELL vs. ASHBURNER,
and

ASHBURNER vs. RUSSELL.

*Partnership deed
Construction of.*

By the 7th clause of a partnership deed it was provided "that the partnership should continue for five years two months and seven days, during which term no partner should retire without the consent of his co-partners, but that the senior partner should have the power of making any new arrangements annually which he might deem requisite for the interest of the new partnership, and its constituents, either in regard to the retirement or admission of partners, or the extent of their shares." The 22d clause provided, "that in case of the retirement or removal of any of the partners during the co-partnership term, his interest in the concern and profits should continue six months, to be calculated from the date of such retirement or removal." The 23d clause also contained provisions "in case of the interest of any partner ceasing or determining, by reason of death, retirement, or removal under any preceding article."

Held—that neither in the 7th clause alone, nor within the four corners of the deed, was any power conferred on the senior partner to remove a co-partner, or dissolve the partnership until the expiration of the time limited by the deed.

Held also—that if such power was to be implied, it should be by necessary implication.

“*First.*—That they, the said parties, shall and will become and continue partners together, as commission agents and merchants in Calcutta, under the name, style, and firm of Messrs. Macintyre and Co. for the period of five years, to be computed from the day of the date of these presents.

“*Seventh.*—That this new partnership shall continue from year to year for the period of five years, two months, and seven days, being from the said 21st day of February 1843, up to the 30th day of April, which will be in the year 1848, both days included, during which term no partner shall retire without the consent of his co-partners, but the said George Ashburner, the senior partner, shall have the power of making any new arrangements annually that he may deem requisite for the interest of the said new partnership, and its constituents, either in regard to the retirement or admission of partners, or the extent of their shares.

“*Ninth.*—That the sum to be drawn out by the partners for personal expences shall in no case exceed for all purposes Rupees 32,000 per annum in the whole, each partner drawing only in proportion to his share and interest on the co-partnership.

“*Twenty-second.*—That in case of the retirement or removal of any of the said partners from the said co-partnership during the said co-partnership term, his interest in the said concern and in the profits thereof, shall continue for the period of six calendar months, to be calculated from the date of such retirement or removal.

“*Twenty-third.*—That as soon as conveniently may be after the interest of any partner shall have ceased and determined, by reason of his death, retirement, or removal under any of the preceding articles, a just and true account of the joint stock and effects or capital of the said co-partnership, together with a particular account of such

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deceased or retired partner's share and interest in such capital, and in the profits and proceeds of the said business, shall be made out and stated, and the amount which shall appear to be due to such partner or partners, shall be paid to such retired partners, or to the executors or administrators of such deceased partner, in the manner following: that is to say, the whole balance appearing at his credit in private account to be payable within three months after the interest of the said partner in the business shall cease, and that the share of the said deceased in the capital of the said partnership above mentioned, shall be payable in manner following: namely, twenty per cent. thereof, on the expiration of three months from the date on which the interest of such deceased, retired, or *removed* partner shall have ceased and been determined, and the remaining eighty per cent. thereof, in two equal payments or instalments of forty per cent. each, at twelve and eighteen months from the said last mentioned date, together with interest thereon, or on so much thereof as shall for the time being remain unpaid, at the rate of eight per cent. per annum, payable yearly, until the said principal monies shall have been fully paid, with power to pay off the amount due to such deceased, retired, or *removed* partner, at such early period or periods as they or he may think proper."

Under the provisions of the deed, the complainant, defendant, and Mr. McCallum continued to carry on business until the 20th February, when Mr. McCallum retired from the firm with the concurrence of his other two partners. In March 1844, in consequence of illness, Mr. Russell was obliged to proceed to Europe; on his return, in April 1845, certain alterations were proposed by Mr. Ashburner to be made in the partnership deed; and on Mr. Russell's requiring them in writing, the following memorandum was forwarded by the former to the latter:

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"I require the following engagement to be given by Mr. Russell in addition to our deed of co-partnership :

"If Mr. Russell shall at any time draw out any money, for his own purposes, without debiting the same immediately to his own private account with the house, or if he shall at any time borrow money for his own private purposes, or incur debts with tradesmen or others, to the extent altogether of 1,000 rupees, or if he shall draw out of the house, a sum amounting to 1,000 rupees beyond that allowed him by our deed of partnership, then and in either of these cases his interest in the house, from the previous 1st of May, is to cease, and he is to retire from the firm, without any right to any portion of the commission which may have been earned, or the profits which may have been made, since the 1st day of May, above-mentioned, excepting, however, his right to the 1000 Rupees per mensem, which he is entitled now to draw, and which he shall be entitled to, for the broken period between the previous 1st May, and the date of his retirement.

"The deed is to provide that my executor is to act for me in the house, with all the powers which I now possess, until my interest in it shall cease and my funds be withdrawn.

"G. A."

Mr. Russell refused to agree to these terms, objecting in toto to the last paragraph ; and also to the first ; principally, because, instead of being general, it appeared to be directed against himself alone ; shortly afterwards Mr. Ashburner advertized Mr. Russell out of the firm, and on the 30th of April 1845 he addressed to Mr. Russell a formal notice of removal in the following terms :

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“To J. L. Russell, Esq.

“Sir,

“Take notice that I hereby remove you from the co-partnership and firm of Messrs. Macintyre and Co. from this date, and dissolve from this day the said co-partnership, so far as relates to your interest therein, *under and by virtue of the power vested in me by our co-partnership deed, dated the 1st day of May 1843, and more especially in exercise of the authority to that effect vested in me by the Seventh Article of that deed; and I beg further to intimate to you that the accounts of the partnership shall be made up with all due dispatch, when the balance (if any) that may appear at your credit, will be paid to you in conformity with the twenty-second and twenty-third articles of our co-partnership deed.*

“G. Ashburner.”

The original bill prayed “that the partnership between the complainant and the defendant might be declared to be in full force and subsisting, and the complainant entitled to his share of the profits under the deed of co-partnership, and that the defendant, under the partnership deed, possessed no power to remove the complainant from the partnership before the expiration of the term fixed by the deed; and that the defendant might be decreed to admit the complainant to all the rights and privileges, and to the performance of the duties of a partner in the firm, in pursuance of the deed, until the expiration of that term. And that the defendant might be decreed to be liable to account to the complainant for and in respect of all the debts and monies collected by the defendant on account of the said firm, and all the business done and profits realised by him on such account, to the extent of the complainant’s share therein.”

The Cross Bill, after setting out most of the facts and statements contained in the original bill and answer thereto, charged that Mr. Ashburner had the right, under the deed, to eject his partners and to dissolve the partnership at will. That Mr. Russell also construed the deed as giving Mr. Ashburner that power, and that the former, about the period of executing that instrument, stated to Mr. Ashburner that the deed placed him at the mercy of the latter, whom he then required to give some pledge (binding in honor if not in law) not to exercise the power arbitrarily, or reduce Mr. Russell's share, or remove him from the firm without some sufficient reason or misconduct on his part. That Mr. Ashburner having readily consented to give such pledge, and having asked Mr. Russell to show the sort of pledge he required, the latter drafted a note, in which Mr. Ashburner made a slight alteration, and then handed the fair copy in Mr. Ashburner's hand-writing, and signed by him, to Mr. Russell. The following is a copy :

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“ My dear Russell,

“ With reference to the clause in our deed of co-partnership, executed to-day, I have no hesitation in promising you that I shall not exercise the power given in regard to dissolving partnership, or altering the shares, without good and sufficient reasons, and for the benefit of the concern, it not being intended that caprice, or any other inadequate motive, should be the spring of such action ; but it being understood that any changes to be made must first be supposed by me to be for the good of the house ; your opinion and that of McCallum's, even if contrary, is to yield to mine, while your present shares shall not be reduced upon the admission of a partner unless in equal proportion with my own.

“ G. Ashburner.”

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Mr. Russell in his answer admitted the drafting this note; but he alleged that he did so under an erroneous impression that Mr. Ashburner possessed the power, (not of removing him from the firm) but of altering the shares of the partners.

The cross bill also charged Mr. Russell with misconduct in falsifying the entries in the books and overdraw- ing his account, in contravention of the terms of the deed, and prayed that it might be declared that com- plainant had full power, either under the deed and letter, or independently thereof, on the ground of defendant's misconduct, to remove defendant from the partnership; and that the partnership was dissolved by the due exercise of that power, or, if not, that it might be dissolved by decree of the Court.

The suit and cross suit now came on to be heard upon evidence taken on both sides.

Mr. *Dickens* and Mr. *Ritchie* appeared for Mr. Russell, the complainant in the original, and defendant in the cross suit: Mr. *Morton* and Mr. *Taylor* for Mr. Ashburner, the defendant in the original, and complainant in the cross suit.

It is scarcely necessary to recapitulate the arguments of the counsel upon the principal points (viz. the construction of the partnership deed, and the legal determination of the partnership) inasmuch as they are fully discussed in the judgment of the Court. Independently, however, of the points above referred to, it was contended on behalf of Mr. Ashburner that as the object of the suit against him was that of obtaining a specific performance of the partnership deed, he was enabled, successfully, according to the authorities, as *defendant* to resist a decree, on the ground, firstly, that the misconduct imputed to Mr. Russell was sufficient to disentitle the latter from obtaining a specific performance of a deed,

a covenant of which he had himself violated; and, secondly, because in all cases of ambiguity in agreements, suspicious circumstances, ignorance of the real facts, &c. the Courts refuse to interfere, or to decree a specific performance; and admit in such instances parol evidence to defeat the written instrument.

The following cases were cited on this point—*West v. Habgood*, (a) *Kimberly v. Jennings*, (b) *Malins v. Freeman*, (c) *Flood v. Finlay*, (d) *Turner v. Lewis*, (e) *Woollam v. Hearn*, (f) *Clarke v. Grant*, (g) *Townsend v. Stangroom*, (h) *Clinan v. Cook*, (i) *Ramsbottom v. Gosden*, (j)

The Court, however, considered this to be virtually, not a bill for a specific performance of an inchoate or executory agreement, but one, the object of which was to compel a party to continue the performance of certain duties in respect of an agreement already executed, and partly acted on. This argument, therefore, was not further pressed. Upon the other questions the Court took time to consider, and now (July 6th.)

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July 6.
Tuesday.

SIR L. PEEL, C. J. delivered judgment.

The first point to be considered in these causes, is whether the partnership which existed between Mr. Ashburner and Mr. Russell has been legally determined. This involves the construction of the partnership deed, and raises the questions whether that deed gave Mr. Ashburner the power of removal, which he claimed and proceeded to exercise; and, supposing such power to be conferred, whether it was well exercised in the particular

(a) 6 Law. J. (N. S.) Ch. 369.

(b) 6 Sim. 340; 5 Law. J. (N. S.)

Ch. 115.

(c) 2 Keen. 25.

(d) 2 B. & Beatt. 9.

(e) 1 Law. J. (N. S.) 177.

(f) 7 Ves. 211.

(g) 14 Ves. 519.

(h) 6 Ves. 328.

(i) 1 Sch. & L. 22.

(j) 1 V. & B. 165.

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instance. The 7th section of the deed in question, if it be construed only by itself, most plainly does not confer the power. By that section, it is provided, that the partnership should continue from year to year for five years, two months, and seven days from a certain day: it was superfluously stipulated that no partner should retire without the leave of his co-partners; and the section further provided, that Mr. Ashburner, the senior partner, should have the power of making "any new arrangements annually that he might deem requisite for the interests of the said new partnership, and its constituents; either in regard to the retirement or admission of partners, or the extent of their shares." This word "retirement," according to Mr. Ashburner's construction, is here equivalent to removal, and means "retirement *involuntary*," by the authority of another, independently of the assent of the party whose retirement is proposed to be effected. But though an authority is plainly conferred by this section on Mr. Ashburner, to effect a retirement independently of the assent of both or of either of his co-partners, it is by no means a consequence that the clause must be construed so as to confer the authority claimed. Mr. Ashburner's own interest might require a power in him to overrule the dissent of one or both of his colleagues to the retirement of a partner. His own retirement might be rendered expedient in his eyes, by the results of trade or other causes. He was the sole monied partner, and risked most in case of serious loss. For instance, he might wish to retire, whilst his partners, or one of them, having less to lose, and possibly taking more sanguine views than himself, might wish the partnership to be continued during the whole period. It would have been prudent, therefore, to provide for his safety in such an event. In like manner it might have been expedient, to reserve to himself the power to overrule the dissent of one colleague to the

withdrawal of another with the assent of the latter and of Mr. Ashburner, either with a view to the introduction of a new partner or otherwise. Effect, therefore, may be given to the word "retirement" in its ordinary sense. The verb "retire" in a previous part of the same clause is used evidently in its ordinary sense.

But in subsequent sections, it seems implied, that some power of removal under the provisions of the deed existed somewhere. The 23d clause is the strongest in support of the argument, that the existence of the power in question is to be collected by inference. This clause certainly alludes to the cessation of the interest of a partner by death, by retirement, or *removal* under any of the provisions of the deed. The power in question is one so opposed in its nature to the general law of partnership, affecting so much the equality of rights of partners under ordinary partnerships, that it must be clearly and unambiguously conferred, and it would be the duty of a Court of justice to watch its exercise with a vigilant jealousy of abuse. Without going so far as to say that such a power may not be inferred, we think, that if it is to be implied, the implication must be a *necessary* one. If the 23d clause were found in a deed which gave in terms no power of removal, the existence of such a power would not be inferred from a reference to the provisions of the deed, such as is contained in that section; it would be deemed an erroneous construction of the existing clauses.

It is to be observed, that this clause is one, the main object of which is to provide for the consequences of a dissolution; it controls the general law in the events for which it provides: it is not framed in any way as an expository clause; and, if the 7th section construed by itself plainly does not confer a power of removal, why must the Court necessarily refer the 23d to the seventh clause, as an exposition necessarily of the meaning of

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that latter clause? Why may it not be a mistaken conclusion in like manner as if the deed had contained no clause, that afforded a colour for the argument? We are not now on the construction of an executory agreement of articles preparatory, but on the construction of a deed which contains the articles of partnership, finally concluded on, and perfected by its execution, which are not varied by subsequent agreement, express or implied, from conduct, a deed on which alone the removal was justified. We think the implication not a necessary one, and decline making it.

Some stress was laid during the argument, on what was termed a cotemporaneous letter, which, it was contended, should be incorporated with the deed. It is difficult to see how this letter can vary the case. The question is not what Mr. Ashburner on the one hand, or Mr. Russell on the other, may have thought about the meaning of the articles of partnership, but what they fairly import on the principles which must govern the construction of such a deed in a Court of justice. Mr. Ashburner's conviction that he had the right could not establish it, nor his conviction that he had it not, deprive him of it, if it in fact existed; neither can Mr. Russell's supposed admission of his antagonist's right, if erroneous, lead the Court to a participation in his error. The whole question as to the existence of the power turns on the words of the deed. It is not an ancient deed to be expounded by cotemporaneous or subsequent usage. The question does not turn on any peculiar signification of a term different from its ordinary signification; if the letter be treated merely as an admission, supposing it to admit all which it was contended that it admitted, it works no estoppel; and it evidences no variation of the partnership contract: for Mr. Ashburner did not say that the partnership deed was varied, but acted in the removal on his legal interpretation of it alone.

The letter, however, evidently shows error, both of law and fact. It is quite plain that none of the parties could have understood the 7th clause in that part which related to the variation of the shares, if they judged such a letter necessary to fortify their position by a qualification of the deed. Mr. Ashburner had no power given him by the 7th section to alter the existing shares, unless on the introduction of a new partner, or the retirement of one. What he was authorized to do was clogged by a condition that he must deem it requisite for the interests of *the new partnership* and its constituents. It was inherent in the nature of such a power so expressed, that it should not be enforced at the suggestion of caprice, or be used to promote merely the individual interests of the donee of the power. It was against imaginary dangers, therefore, that they sought to fortify themselves. If upon the introduction of a new partner, Mr. Ashburner had created the new partner's share out of the shares of the two other partners alone, and had retained his full eight annas share, it would have been most difficult to support such an arrangement, on the mere allegation that either the interests of the partnership, or of the constituents, required such a division of the shares. The word introduced into this letter, which is supposed to admit the power claimed, is dissolution, not removal, and where such vague and incorrect notions manifestly existed as to one part of the 7th section, why may not error have extended itself to another? An ambiguous instrument is sought to be cleared up by a letter erroneous and not unambiguous. On the whole, therefore, the existence of the power is not established. On the deed alone Mr. Ashburner professed to act. But if the power did exist, we think that its exercise in this instance cannot be supported. Such a power cannot be made the instrument of effecting indirect advantages, not necessary for the furtherance of partnership objects. Mr. Ashburner stipulated for powers to be conferred on his executors on

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which he had no right to insist. The power sought to be conferred on his executor in the case of his death was a power at variance with the partnership deed; it would have made the surviving partner subject to the authority of one not a partner at all (an undisclosed person) and would have affected the interests of the surviving partner or partners most materially. It was much more than was necessary for the mere protection of Mr. Ashburner's family, and Mr. Russell's refusal to execute the memorandum containing this objectionable provision, Mr. Ashburner made one of the grounds of his removal from the partnership. The removal did not purport to proceed on misconduct alone, whether real or supposed only. We think that it was the duty of Mr. Ashburner, if he meant to insist on misconduct, as the sole justifying ground of removal, to state this explicitly at the time of removal, and to specify in what it consisted; so as to give Mr. Russell an opportunity of offering explanation, and of taking advice on his position. Mr. Ashburner was exercising a species of condemnation on his partner, and visiting him with penal consequences for alleged misconduct. We think also that Mr. Russell should, during his residence in England, have been directly apprized by Mr. Ashburner of what was in reserve for him on his return to India. We cannot uphold this as a reasonable and fair exercise of such a power on the assumption of its existence. We think, therefore, that the partnership must be taken to be legally continuing, and that an account must be taken on the footing of a still continuing partnership, and not limited to the time of filing the bill. The imputed misconduct in overdrawing is not of that gross character which would have justified a Court of Equity in dissolving a contract of partnership on the ground of misconduct. The evidence fails to establish the graver head of imputation, that by studied and fraudulent concealment, effected through deceptive entries in the partnership books, by his instrumentality introduced,

Mr. Russell had overdrawn his account. The evidence in fact fails to show that these entries can be brought home to Mr. Russell as his entries. Mr. Ashburner might at any time, by an inspection of the books, which was always in his power, have discovered what had been done, (as observed by Lord Eldon in his judgment in *Goodman v. Whitcomb*, 1st Jacob and Walker, p. 593.) Mr. Ashburner seems to have considered the precautions he subsequently named, as adequate securities against extravagance or overdrawing; and to this part of the memorandum no objection appears to have been offered on Mr. Russell's part. We think the proof fails to show that a dissolution could have been obtained by resort to a Court of Equity on the ground of gross misconduct: and that no ground exists for refusing the account to the full extent for which it is asked. Mr. Russell is entitled to a moiety of the share of the retiring partner; therefore, to a seven annas share from the retirement of such party.

The case made by the cross bill not being established by proof, that bill must be dismissed.

Plea Side.

RADANATH SAHA *vs.* A. F. SMITH, Sheriff, &c.

GOPEENATH SAHA *vs.* SAME.

TRESPASS—for breaking and entering divers, to wit three several golahs or godowns of the plaintiff, situate severally and respectively at Hautcollah in Calcutta, and

three closes of the Plaintiff and seizing and sealing three godowns situate thereon. 3d *Plea*—After stating that a writ had been issued by the Judge of Zillah Backergunge, directed to the Nazir of that Zillah commanding him to distrain certain lands goods and chattels as per accompanying list "A pukka built dwelling-house including out-offices and golahs or godowns, containing rice about 59,000 maunds, situated in Sotah Looty Hautcollah, belonging to Mirtonjoy Saha and others," in satisfaction of a decree against them by the Court of Sudder Dewanny Adawlut; proceeded to justify thereunder, stating that the above writ, being duly delivered into the office of the defendant as sheriff, and duly endorsed under the hand and signature of a Judge of this Court (according to the provisions of Act 23 of 1840) the defendant was directed to execute the same as such sheriff (which he did) within the limits of Calcutta and thereby committed the trespasses complained of. *Demurrer* in substance, that the plea disclosed no defence to the action, and that it contained an argumentative denial of Plaintiff's property. *Held* on both points—that the plea was *good*.

1847.
July 8.
Thursday.

Mofussil process
Sheriff,
Trespass—Pleading
Justification under
Act 23d of 1840.
Trespass against
the Sheriff for break-
ing and entering

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then making a great noise and disturbance therein, and staying and continuing therein making such noise and disturbance for the space of ten hours then next following; and also for then seizing and sealing the said three several golahs or godowns, and then locking up and fastening the same respectively, for a long space of time, to wit from thence hitherto, whereby the plaintiffs were disturbed in the peaceable possession thereof, and were deprived of the profits and advantages accruing from such possession, and also of divers goods, to wit 10,000 maunds of rice, of the value of Co.'s Rs. 20,000, then and still being within the said golahs or godowns.

The plaint also contained a count *de bonis asportatis*.

Second plea—That at the time of the committing of the said several trespasses in the plaint alleged to have been committed by this defendant, he, this defendant, was sheriff of the town of Calcutta, and that the said golahs, godowns, and goods, in the said plaint mentioned were all respectively at the time last aforesaid situate and being within the town of Calcutta, and that by an act of the Legislative Council of India, duly made and published, and entitled Act No. 23 of 1840, it was, among other things, and in substance and effect, enacted to wit as follows. “That any writ, warrant, or other process issued by any Court, Judge, or Magistrate, in the territories beyond the local limits of the Supreme Court of Calcutta, Madras, and Bombay, respectively, may be executed within those limits in manner following; a copy of such writ, warrant or other process, authenticated as such by the attestation of the Court, Judge or Magistrate signing or issuing the same, accompanied by a certified translation in the English language, shall be presented to any Judge of Her Majesty's Courts, who may thereupon, under his hand and signature, endorse and direct the same to be executed within the local limits of any of Her Majesty's Courts by the sheriff, or by any justice of the

peace, according to the nature of such writ, warrant, or other process so endorsed as aforesaid, to any such sheriff as aforesaid, and every such sheriff shall make a memorandum of the date of such delivery, and shall execute such writ, warrant, or process in like manner as if the same had originally issued from any of Her Majesty's Courts, and had been delivered at the date as appearing by the memorandum; and such sheriff shall make no distinction as to priority or otherwise between the execution of any writ, warrant, or other process originally issued from any of Her Majesty's Courts, and the execution of any writ, warrant, or other process under this Act; but every writ, warrant, and other process, whether original or endorsed as aforesaid, shall amongst each other be subject to the same rules, touching the mode and order of execution, as are now established in respect of writs, warrants, and other process originally issued from Her Majesty's Courts of Justice," and this defendant says that whilst he was such sheriff as aforesaid, to wit on the 10th day of March, 1847, a certain writ or process from the Court and Judge of the zillah of Backergunge was duly delivered into the office of the defendant, as such sheriff as aforesaid, which said writ or process was in substance and effect to wit as follows.

"To the Nazir of the Court of Dewany Adawlut for the zillah of Backergunge.

"Whereas Mirtonjoy Saha, Dhumonjoy Saha deceased (his wife's name not known, but is termed Sondamoney in the wakeelut-nameh,) and Jadaub, heir of Hurrikhisto Saha, Nilkant Roy, Boycaunt Roy (son of Ramjoy Saha deceased,) Khennissurree (wife of Ruttonjoy Roy deceased) Ramnath Saha Gourmoney (wife of Buddinath Saha deceased,) were directed by a decree of the Court of Sudder Dewany Adawlut, under date the 3rd of December, 1845, to pay to Baboo Gopaul Loll Thacoor the sum of Co.'s Rs. 4,177-2-5 with interest at 12 per

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cent. per annum to the day of payment, which to the 17th of February amounts to Rs. 921-3, and Rs. 998 for costs of suit of the zillah Court, and Rs. 556-5-5 of the presidency Court of Sudder Dewany Adawlut, amounting to Rs. 6,652-12-5 : and whereas the said Mirtonjoy Saha and others having had notice of this decree, have omitted to liquidate the same ; these are therefore to command you to levy the said sum of Rs. 6,652-12-5, and the sum of Rs. 26-2 for the cost of executing this process, by distress and sale of the lands, goods, and chattels (as per accompanying list) of the said Mirtonjoy Saha and others, and you are hereby ordered and directed to distrain the lands, goods, and chattels of the said Mirtonjoy Saha and others, and to sell and dispose of the same within thirty days, unless the sum of Rs. 6,678-14-5, for which such distress shall be made, together with the reasonable charges of taking and keeping such distress, shall be sooner paid : and you are hereby commanded to certify to me what you shall do by virtue of this warrant.—Given under my hand and the seal of the Court at Burrisaul, this 4th day of March, 1847.

“ R. J. Loughnan,
Judge.”

List of property, &c. belonging to Mirtonjoy Saha and others—defendants—

“ A pukka built dwelling-house including out offices and golahs containing rice about 59,000 maunds situated in Sootah Looty Hautcollah.”

Zillah Backergunge,
Dewany Adawlut,
4th March, 1847. }

“ R. J. Loughnan,
Judge.”

And this defendant saith, that the said zillah Court of Backergunge was and is a Court of the East India Company, having competent jurisdiction and authority to

issue such writ or process as aforesaid, and that the said R. J. Loughnan was the duly constituted Judge of the said last mentioned Court, and had competent authority to sign and issue the said last mentioned writ or process ; and this defendant saith, that after the said writ or process had been so duly delivered into the office of this defendant, as such sheriff as aforesaid, the same was, to wit on the 11th day of March, 1847, duly (under the provisions of the said Act No. 23 of 1840) presented to Sir Henry W. Seton, Knight, (he the said Sir H. W. Seton, Knight, being one of the Judges of this Court,) who did thereupon, under his hand and signature, endorse and direct the same to be executed by this defendant, as such sheriff as aforesaid, within the limits of the said Supreme Court, as required by the said Act No. 23 of 1840, and thereupon the said writ or process, with the said endorsement of the said Sir H. W. Seton, Knight, thereon, was again duly re-delivered to this defendant, as such sheriff as aforesaid, to be executed as aforesaid, and thereupon this defendant did, as such sheriff as aforesaid, duly execute the same within the limits of Calcutta, and at the same time in the said plaint in that behalf alleged, in the execution of the said writ or process so endorsed as aforesaid, then and there committed the said several acts in the said plaint alleged and complained of as acts of trespass. Verification.

Demurrer to second plea.—That the same amounts to the general issue. That the plea constitutes no defence to the cause of action. That it does not deny the property of the plaintiff in the said godowns and goods, and their possessory right thereto ; but if it does, still such denial is framed in an uncertain, argumentative, and circuitous manner, and by implication only :—That the plea admitting as aforesaid the possessory title of the plaintiff and the commission of the trespasses, proceeds to justify the said trespasses and seizure complained of, under

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authority of law, and by virtue of process against the said Mirtonjoy Saha and others, without going on to allege that the said M. Saha and others, or any or either of them, had any title, superior or otherwise, to that of the plaintiff to the said goods and godowns, or that they or any of them possessed goods (independently of the goods of the plaintiff) within the said godowns, or even that the defendant had reasonable cause for suspecting that such was the fact:—that, even supposing the said writ in the said plea mentioned authorised the defendant to seize the very lands, goods, and chattels in the said writ specified, (without enquiring whether or not they were the property of the party against whom such writ issued,) still there ought to have been a statement or allegation in the said plea, showing that those lands, goods, and chattels so seized thereunder, were identical with the godowns, goods, and chattels in respect of which the action is brought: because, for ought that appears in the said plea, the said godowns, goods, and chattels in the plaint mentioned are other and different to the lands, goods, and chattels, which the said writ may have authorised the defendant to seize, otherwise, the plea justifies a trespass in respect of which the plaintiff does not sue.—Joinder in demurrer.

The pleadings in the case of *Gopeenath Saha v. Smith, Sheriff, &c.* and the points raised by the demurrer were identical with those in *Radanath Saha v. Smith, Sheriff, &c.* the two cases were consequently called on and argued together.

On the opening of the argument, the defendant's counsel prayed leave of the Court, with consent of the other side, to amend the pleas, ore tenus, with reference to the last objection taken by the demurrer. An averment was accordingly introduced to the effect "that the golahs, goods, and chattels seized, were identical with the golahs, goods, and chattels in the writ and plaint mentioned."—The argument then proceeded on the other objections.

Mr. *Taylor* in support of the demurrer in the case of Radanath Saha. Mr. *Morton* in support of the demurrer in that of Gopeenath.

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Without the aid of the averment now introduced, the plea would clearly have been bad. In its present amended form, the question attempted to be raised is whether the sheriff is not altogether exonerated from liability in the execution of a writ, which specifically directs him to seize specific goods and chattels, as the property of the party against whom the process issues, and whether such specific direction does not relieve him from responsibility, although he seize, in fact, the property of a third party.

[*The Chief Justice.* Is it necessary that the sheriff should look beyond the writ, which directs him to seize the identical property mentioned in it, as the property of the defendant?]

It is submitted that his common law liability attaches in every case, whether the direction to seize be general or specific, and he is bound to make enquiry as to the true ownership. This is an execution under a mofussil writ, which directs the sheriff to seize the lands, goods, and chattels of those persons against whom the judgment in the mofussil proceeded, at the same time giving a description of certain property assumed to belong to those individuals. This was sufficient to impose upon the sheriff the duty of making enquiries as to the true ownership of the property in question. If, on enquiry, it was ascertained that it did not belong to the defendants in the mofussil suit, the sheriff might have returned "nulla bona," and such a return would have been good: because, as the form of this writ is not general, but limits the power of the sheriff to seize the particular goods and chattels in the writ described, and those only, the sheriff's duty, on his ascertaining that the goods belonged to per-

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sons other than those against whom the mofussil process issued, would cease and determine:—or he might have returned the writ to a Judge of this Court for further instructions under the circumstances. The list is very loose and indefinite in its terms: so much so, indeed, that it is difficult even now to guess, whether the property actually seized is the same as that which the Magistrate, issuing the writ, intended should be seized. There may have been half a dozen persons in the possession of golahs, with rice deposited in them, in Sootah Looty Hautcollah,—and already several persons appear as plaintiffs upon the records now before the Court, and under discussion, claiming various portions of the property seized. But this description of the goods after all is mere surplusage. If this property, instead of being specifically mentioned in the writ, had been manually pointed out by the creditor himself, it is clear that the sheriff would have been liable, had the property seized turned out to be that of the wrong person. The written direction to seize in no respects differs from a verbal one. In the latter case the sheriff is bound to make enquiries, and there is no reason why he should not in the former. The Act No. 23 of 1840 contains express directions that the process and execution of these writs, after delivery into the hands of the sheriff, shall be assimilated to the practice of this Court, and the sheriff's liabilities in respect thereof shall be the same. The form of writs of execution adopted in this Court is general, not specific. When, therefore, a mofussil writ under this Act is placed in the hands of the sheriff for the purpose of being executed, the form should be general; otherwise it is irregular, and ought not to be endorsed by the Judge, or to be executed at all.

[*The Chief Justice*—There is a form of writ in this Court directing the sheriff to seize a specific chattel, for

instance in detinue, where the direction is to seize the very thing detained.]

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No doubt, the judgment in order to be consistent and regular, must follow the nature of the original cause of action, but even in detinue, although the judgment is that "plaintiff do recover the very goods and chattels sued for, or their value," still the sheriff is directed to distrain on *all* the lands and chattels of a defendant within the bailwick to satisfy that judgment. In executions for debt, however, the form in this Court is invariably general, and the writ set out in the plea discloses this to have been an execution for *debt*. Had this writ therefore been issued out originally from this Court, the form should, and in fact would have been, as of course, general; and as the practice in regard to these mofussil writs is assimilated to that of this Court, the form of the writ under discussion ought to have been general also.

[*The Chief Justice*—The mandatory part directs the sheriff "to levy by distress on the lands, goods, and chattels, as per accompanying list, and to sell the same," this is analogous to the writ of *distringas* of this Court.]

It is submitted that is not so. Even in the writ of *distringas* in detinue, the mandate is to distrain on *all* the lands and chattels within the bailwick, until a further command be issued to the sheriff, so that the defendant render the chattel or the value thereof. But the form in the present instance is analogous to none known in the practice of this Court. With regard to the fact of the endorsement of the writ by a Judge of the Supreme Court, it can scarcely be thence inferred, that the sheriff acted *judicially*, inasmuch as that endorsement operated only as an authority to execute the writ according to its exigency within the jurisdiction of this Court. The mandate being

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to the sheriff, shows that he acted in a ministerial capacity only, and without the endorsement of the Judge, he could not have acted at all. If the sheriff be not liable, a mofussil creditor may point out any lands or goods, belonging to strangers, within the jurisdiction of the Supreme Court, as the property of his debtor; and having thus illegally satisfied the debt due to himself, he may, by avoiding the jurisdiction, render the party suing in respect of the trespass wholly without remedy.

Mr. *Dickens* in support of the pleas was stopped by the Court.

SIR L. PEEL, C. J. It may be proper to consider upon the construction of this act, whether a process in this form should hereafter be endorsed; that, however, at present, it is unnecessary to decide. The real question is, whether the sheriff who executes a Mofussil writ, endorsed under the hand of a Judge of this Court in the manner directed, can be made liable in trespass. Now the sheriff need not look beyond his writ, for that is his protection. On these pleadings it must be assumed that the Court below had competent jurisdiction to issue the writ; the mandatory part of it directs the sheriff "to proceed by distress and sale of the lands, goods, and chattels of the said Mirtonjoy Saha and others, as per accompanying list:"—this is analogous to certain writs both in real and mixed actions, which proceed against specific lands or goods and chattels: as, for instance, in replevin. The sheriff is protected, if he obeys the mandate. The general direction is equivalent to a direction that the sheriff is to execute the writ in a mode similar to the practice of this Court. Suppose the Court to be in error in thus directing the sheriff, the latter is not therefore responsible; the fault would be that of the Court and not of the sheriff. It is like applying a wrong form of

writ to the particular action; the Court might be wrong, but the sheriff need not look beyond his writ.

It has been questioned whether this writ sufficiently points out the specific property to be seized. We think it does so: there is certainly no direction to seize the goods of the party generally; and unless the direction were specific, the sheriff would, in fact, have nothing to seize. The obscurity here is in the vagueness of the description of the specific things attempted to be described. The substantial objection therefore cannot prevail. Nor do we think the pleas contain an argumentative denial of the property of the Plaintiffs.

Demurrers overruled.

THE QUEEN *v.* OGILVIE,

In Re

RADACAUNT DUTT.

A WRIT of habeas corpus was moved for to be directed to one James Ogilvie, of Cornwallis-Square, Simlah, in the Town of Calcutta, commanding him to bring up to the Supreme Court, the body of Radacaunt Dutt, an infant under the age of 16 years, alleged to be detained in his custody. The writ was obtained upon an affidavit in substance to the effect "that Radacaunt Dutt was an infant of the age of 14 years 11 months and 19 days; that he had for some time previously received his education as a day-scholar at Queen's College in Cornwallis-Square, Simlah, in Calcutta, of which institution James Ogilvie was resident teacher and superintendent, and whereof he had the management. That one evening Ramchund Dutt, the father of Radacaunt, finding the child had not returned home, proceeded to the school, and on ascertaining his son to be there, requested James Ogilvie to allow him to take him away; James Ogilvie replied that Radacaunt was not forcibly restrained from

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Plea Side.

RADANATH SAHA
v.
SMITH.

1847.

July 8.

Thursday.

Habeas corpus.
Right of Hindu
father to Custody
of infant child.

When an infant, supposed to be improperly in custody, is brought up on *habeas corpus*, the Court will (if he appear to be capable of exercising a sound judgment and discretion) allow him to depart wherever he lists; minority simply will not entitle a father to the custody of his child.

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accompanying his father, and the child might go, if he wished it, but (he added) that no force should be used to compel him to do so. Whereupon Ramchund attempted to lead Radacaunt away, but resistance was made by persons under the order of James Ogilvie whereby Ramchund was frustrated in his attempt. That the next day James Ogilvie locked up Ramchund's son in a room so as to prevent any further access to him."

The writ having been granted, the following return thereto was made:

"I James Ogilvie in the within writ named do certify that the said Radacaunt Dutt is not and never has been detained in my custody and that I do not and never did exercise over his movements any control power or dominion whatsoever and I do further certify that I the said James Ogilvie have been since January 1846 the superintendant and a resident teacher of the institution of the General Assembly of the Church of Scotland and that the said Radacaunt Dutt then became a pupil of and attended the said Institution as such pupil voluntarily and continued such attendance until the month of March last when he left the said Institution and that he returned thereto voluntarily as a daily scholar in the month of July last and that the said Radacaunt Dutt has always been and is now at perfect liberty to go wherever he pleases and I the said James Ogilvie am unable to compel the attendance of the said Radacaunt Dutt (who represents himself to me to be of the age of 17 years) in Her Majesty's Supreme Court or before the Honorable Judges thereof but that I have endeavoured to persuade the said Radacaunt Dutt voluntarily to appear before the said Judges. Dated this 20th day of August 1847."

Mr. *Dickens* and Mr. *Morton* now moved to file the above return. They contended that the affidavit of Mr. Ogilvie distinctly denied the exercise of any restraint,

past or present, such as that charged, or otherwise, over the inclination or the movements of Radacaunt, either by himself or any person under his authority: that the only question for the Court now to consider, was what the form of the order should be with respect to the child's present actions, he being capable of judging for himself. They cited *Rex v. Greenhill* (a) for the purpose of showing that where a person supposed to be improperly in custody is brought up on habeas corpus, the Court, if there appear no ground for restraint, will order such person to be set at liberty to go where he pleases, and, if necessary, give him the protection of an officer in going.

Mr. *Clarke* contra contended—That a clear case of forcible detention had been made out. That as a general rule a father had the custody of his children during their minority: amongst Hindus a child did not attain majority until he reached the age of 16 years, and as in the present instance the boy was under that age, the father was entitled to the custody of him. He referred also to 17th Geo. 3d sec. 70, and to Brejonath Bose's case, (b) heard eight or ten years ago before Ryan C. J. and Grant and Malkin, Js. The boy in that case was admitted to be past 14 years old, and he had voluntarily gone to the Missionaries. He protested against being delivered up to his father, and declared he was a Christian, and that his family would murder him. He clung to the table of the Court-house and screamed violently, but the Court decided that they were precluded from interfering with the right of a Hindu father, and desired the latter to remove him, which was effected, after considerable resistance by the son in the presence of the Court.

(a) 4 Ad. & E. 624; 6 N. any of the published books, but M. 244. (1836.) appears at some length in the

(b) This case is not reported in daily periodicals of the time.

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SIR L. PEEL, C. J. The question for our consideration is simply, whether, under the circumstances of this case, a writ of habeas corpus is the proper remedy for a father to vindicate his rights to the possession of his son during minority. We are not called upon to decide on the extent in general of a Hindu father's authority in modern times over his son during his minority, which is certainly larger than that under the English Law. Nor is the question here—what is the best and most effectual remedy for the vindication of a father's rights over his son. That the writ of habeas corpus is not the appropriate remedy will be apparent from a short consideration of the subject. It cannot issue against the son himself, for it proceeds on the supposition of a restraint on his personal liberty, and this species of the writ is the appropriate remedy for the purpose. Incidentally the rights to guardianship are discussed when a child is brought into Court under it, of such an age, or imperfect power of judgment, as to be, in the eye of the law, incapable of exercising a will on the subject of his residence. In such cases, when the legal guardianship is interfered with, and no actual assent can be established, the party in possession of the child is considered as exercising a restraint over the person of the child, and the writ is, by a species of fiction, not diverted from its proper purpose. But if a child, though a minor, were neither actually nor constructively under any restraint whatever at the time of issuing the writ, the writ could not be directed against himself when actually at liberty, and practically a free agent, to assert the father's alleged right to the possession of the person of such child. It is important to keep the writ to its proper use, to prevent third persons, who are neither actually nor constructively guilty of any restraint on the person of the child, from being involved in such distressing disputes between parent and child, and from being needlessly exposed to litiga-

tion. In fact a return by one, from whose position no moral contract could be inferred, denying all custody, possession, power or control over the child at the time of suing out the writ, or since, if clearly and unambiguously expressed, would be a good return, and the practical difficulty of compelling one person to bring into Court another in no way subject to his control, nor under his keeping, would of itself go a long way to show the restricted nature of the remedy. The case of *The King against Greenhill* must govern our decision. It is later in fact than the case decided in this Court, and on the construction of the writ of habeas corpus, we are bound to follow the decisions of the Courts of England in preference to any of this Court; if there were indeed any conflict between them. The case in this Court seems to have been decided in a great degree on its special circumstances, and we cannot collect from it that the learned Judges who decided it meant to say that minority simply was the only test. If it were, it would follow, that it would generally be the sole test under different systems of law, which protract majority to a later period than does the Hindu law. And the whole current of authorities is opposed to this view. It remains, then, to consider, whether the Court is bound to say that every child under 16 years of age, is so naturally deficient in judgment and discretion that the Court must treat it as of tender years, and apply (contrary to the fact) the fiction of a restraint on its person. If this cannot (and we think it cannot) be asserted, then each case must depend on the evidence of age and discretion. Now under the English Law, where the period of majority is deferred to a much later period, a child under an earlier age than 16 is deemed, for many purposes of a most important character, to have a competent discretion and judgment. In modern times, the authority of the father over the son under that law, has been rather narrowed than enlarged. In one case, contrary to the authority of a dictum of Comyn C. B. in his

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Digest it was decided that a father could not bind his son, though a minor and an apprentice, without his assent. I am not aware of any remedy that the father possesses either at common law or in equity (which goes farther than the common law in the enforcement of and in the restriction on parental rights,) to enforce in all cases, (when he chooses to insist on such residence,) the residence under his roof of sons, minors, and not themselves emancipated; nor do I think that such an exercise of parental authority would be favorably viewed, if based on the mere ground of minority. That the writ of habeas corpus is not the mode to assert such a right, if it exist, is abundantly clear. The statute which has been referred to on the subject of the rights of a Hindu father, does not, in our opinion, affect the question before us. It is equally the duty and the inclination of the Court to give full effect to the provisions of that Act, but they have no effect in enlarging the operation of a writ of habeas corpus. It may be questioned if that Act is not in a great measure declaratory; but be that as it may, it is the bounden duty of the Court to give full effect to the parental authority of a Hindu father, as it is exercised in modern times, and it is equally the duty of the Court to give effect to the religious rights and usages of the Hindus when the subject of judicial decision, directly or indirectly, for that duty is also enjoined by the statute. There has been in this case a laudable abstinence at the Bar from allusion to religious topics. The Court will not be influenced in any way by opinions entertained by the Judges as individuals, of superiority of creed to creed: nor will they put any questions to this boy of a religious character. His intelligence may be ascertained without reference to his religious opinions, past or present, and any allusion to them is to be avoided for obvious reasons. The writ was properly issued in this case on the affidavits laid before us. But we are satisfied on Mr. Ogilvie's affidavit that no restraint has been exer-

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cised over the boy: and that the latter, with his own full assent, and of his own free will, was resident with the former. When the father or those with him were about to use force, it appears that Mr. Ogilvie stated that he would not suffer force to be used to remove the boy: but it does not appear that any actual obstruction was offered; the intimation seems to have proved sufficient where the father has a right to have his son resident under his roof (and we should be loth to throw any doubt on this general right in the case of a son not yet quite 15) he may, if the child, on a personal interview between them, refuse to return, use force to remove him, taking care always to use no unnecessary violence, and first to make a request. In such a case, the father would not be a wrong doer nor liable to action, but those interfering against his right would be so. Such interference as has taken place in this instance does not in our opinion constitute a restraint on the freedom. No actual or constructive restraint on Mr. Ogilvie's part is made out. The progress of the boy under Mr. Ogilvie's tuition is deposed to on oath. His general capacity and intelligence are not in fact disputed, and we have no doubt of them, and it appears to us, on the authorities, that we must leave him in the state of actual freedom in which our writ found him, and that all we can do is to tell him we do not decide adversely to the father's right to the possession of his person, and the custody and care of him, but that now he may elect to go to the place whence he came, or to his father's house.

As the circumstances are not fully before us, we cannot say positively that the father's right is not in any way abridged, but nothing is shown to us to lead us to the conclusion that it has suffered any diminution.

NOTE.—The child, upon being questioned by the Court, preferred returning to the school, and an officer was directed to protect him in going there.

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July 12.

Monday.

*Pleading.**Accord and satisfaction.**Statement of value.*

To an action brought by the representatives of one R. N. against the executors of one D. T. upon a contract by the latter to indemnify R. N. on default in payment of a debt due by A. B. and C. to R. N. the defendants pleaded, that before breach A. B. and C. at the request of R. N. made their indenture, and sealed and delivered the same, as their act and deed, to R. N. which indenture R. N. accepted in full satisfaction and discharge of the promise of D. T.

Held bad—on the ground, that the nature of the indenture should have been described, or it should have been stated to be of some value, or that some consideration passed.

Plea Side.

RAJINDROCHUNDER NEOGHY,

vs.

D. M. GORDON and others.

DEMURRER to plea by way of accord and satisfaction. The plaint was filed by the representative of one Russickchunder Neoghy against the defendants as executors of one Dwarkanauth Tagore, and alleged that certain persons, by name Lulleetmohun, Woopindromohun, and Brijomohun Tagore, being indebted to Russickchunder Neoghy in a large sum of money, deposited the title deeds and muniments of a Zemindaree called Nazee-pore, by way of collateral security for the above debt; that the depositors, being subsequently desirous of substituting, in lieu of those securities, other title deeds of lands situate at Puttoreah Ghattah, Dwarkanath Tagore, in consideration of Russickchunder Neoghy's assent to that proposition, promised to be answerable for and to pay any deficiency which might thereafter occur, on default being made by the depositors. The plaint then stated that a suit on the equity side of the Court was instituted against the last mentioned parties by Russickchunder Neoghy, and costs incurred in respect thereof—that the estate at Puttoreah Ghattah was sold under a decree in that suit, but the amount realized was insufficient to satisfy Russickchunder's claim; whereby Dwarkanauth Tagore became liable to pay the deficiency.

4th Plea—That, after making the supposed promise by the said Dwarkanauth Tagore therein mentioned, and before any breach thereof, to wit on, &c. the said L. Tagore, W. Tagore and B. Tagore, at the request of the said Russickchunder Neoghy, duly made their certain Indenture and respectively sealed the same and delivered the same as their act and deed to him the said Russickchunder Neoghy, which said Indenture the said L. Tagore, W. Ta-

gore and B. Tagore then delivered to the said Russick-chunder Neoghy, who then accepted the same in full satisfaction and discharge of the said supposed promise of the said Dwarkanauth Tagore. Verification.

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Demurrer—assigning for cause that the said 4th plea is uncertain, and does not allege or show that the said indenture in the said plea alleged to have been made and delivered, was made of or concerning or in any way relative to the premises, or the promise in the plaint mentioned; nor does it show how the alleged making and delivery of the said indenture could be a satisfaction of the promise and cause of action, or afford to the plaintiff any equivalent benefit or compensation in lieu of the said promise: nor does it show how the taking of the said indenture could be a merger of the simple contract claim, or that the remedy thereon was co-extensive with the plaintiff's remedy for a breach of the said alleged promise, or that the plaintiff had any remedy thereon at all. That it is not alleged that the said indenture contains any covenant for the payment of money by the parties executing to the plaintiff, or any one on his behalf, or to do any beneficial act whatever for the plaintiff: and also for that the said 4th plea is contradictory and repugnant, inasmuch as while it purports to be a plea in confession and avoidance, it does not confess the alleged promise, but denies the same by terming it a *supposed* promise, and yet alleges the indenture to have been executed and delivered in satisfaction and discharge of the said supposed promise, and also that the 4th plea does not show accord with satisfaction. Joinder.

Mr. *Dickens* in support of the demurrer—The words “after making the said *supposed* promise,” does not sufficiently confess and avoid or deny the cause of action, *Margett v. Bays (a)*

(a) 4 Ad. & E. 489; 6 N. & M. 228; & 5 Law. J. (N. S.) K. B. 105.

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(Mr. *Morton*. That decision turned upon the insertion of the words "if any such there be"—the case of *Eavestaff v. Russell* (a) is expressly in point.—It was there held that "supposed" meant nothing more than "alleged") (b)

Then as to the substantial points—The indenture is pleaded with a *videlicet* and is alleged to have been taken in satisfaction, without showing how. The plea is silent as to the contents of the instrument; whether it was valueless or otherwise; or whether it tended to the benefit or detriment of the party giving or accepting it; but it is pleaded as in extinguishment of the prior claim. Then the plea, if it shows an accord, still does not disclose satisfaction. He cited *Chitty on Contracts*, 783: *Twopeny v. Young* (c) and *Forster v. Western* (d) and was stopped by the Court.

Mr. *Morton* in support of the plea. The argument on the other side confounds the plea of accord and satisfaction with a plea of merger. There is no statement here of any merger; all that is stated is to the effect, that the particular instrument was received in satisfaction, before any liability accrued to the principals.

[*The Chief Justice*. You must show the thing taken to be of *some* value, or state that there was some consideration.]

This indenture is not given for a *debt*, but in respect of a liability contingent: to allege the value of the indenture would be to state, what is, in fact, immaterial.

[*The Chief Justice*. According to your argument the giving and acceptance of an indenture would, of itself, operate as accord and satisfaction, a piece of paper or

(a) 10 M. & W. 366; 12 Law.
J. Ex. 176.

(c) 3 B. & C. 208.

(d) 2 B. N. C.; 3 Scott. 155, 164.

(b) This objection was not further pressed.

parchment might as well be alleged to have been taken in satisfaction.]

Certainly. That might be so stated : if there is an allegation of accord and of satisfaction such averment would be sufficient. The question whether or not the thing taken in satisfaction is of equivalent value is not now before the Court. It is contended that any thing, however small or trifling, may, to an unliquidated demand, be pleaded to have been accepted in accord and satisfaction. A *debt* is different, for that is of ascertained value, and, of course, a lesser sum cannot be pleaded in satisfaction of a greater. However, this indenture may be presumed to be of some although uncertain value. The case of *Andrews* against *Boughey* (a) is an authority to show that the value is immaterial. There the declaration was for delivering 373 pounds of bad wax upon an assumpsit for 400 of good and merchantable wax, stating half the price to have been paid in hand, the rest to be paid on a day agreed. To this the defendant pleaded, that before the time appointed for the delivery of the residue of the wax, "the plaintiff and defendant agreed that if the defendant would deliver immediately to the plaintiff one cake of wax weighing 20 pounds, the defendant would accept that in satisfaction as well for the 373 pounds as for the residue, which was to be delivered;" the agreement was then pleaded as executed with acceptance by the plaintiff accordingly : this plea was held a good answer. The Court said "the bar seemed good enough, for the effect and substance of the action is that the defendant hath not performed his bargain, *scil.* with good and merchantable wax, according to his undertaking, but that it was corrupted and mixed as above and deceitful ; for which the plaintiff has received satisfaction and recompense by the cake, and by his own acceptance, although it were not

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(a) Dyer 75. a.

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one hundredth part of the value of his loss, yet, by his own accord and agreement, this injury is dispensed with; and in all actions in which nothing but amends is to be recovered in damages, there a concord carried into execution is a good plea. This, it is submitted, is an authority very much in point—for in the present case the concord is executed, and the creditor, by his own acceptance of the indenture, (whatever may be its value), has admitted himself to have been sufficiently recompensed.

If the indenture had created a charge upon the takers, it is submitted, it would have made no difference. It is similar to the case of a guarantee, the value of which it would not be necessary to allege.

SIR. L. PEEL, C. J. The authorities show that the accord and satisfaction pleaded ought to be set out. A guarantee is a valuable thing, and it may be inferred to be so. It is clear that the accord and satisfaction must be shown, for instance, that it may be seen what the nature of it was; whether it enured to the benefit of the plaintiff or otherwise; whether it was of some, although of uncertain value; here we cannot ascertain whether the accord and satisfaction was or not reasonable—whether valueless or not—or whether to the benefit or detriment of plaintiff. No case has been referred to controverting the authority of that decided in the Common Pleas.

Demurrer allowed.

NOTE.—In the case of *Sibree v. Tripp* 15 Law J. Ex. 318 (1846) inquiry as to the *value* or the *reasonableness* of the satisfaction. The many of the old authorities on this subject are reviewed, and it was decided (particularly in the very learned judgment of Parke B.) that where the satisfaction is by giving a *different thing*, the Court cannot enter into an enquiry as to the *value* or the *reasonableness* of the satisfaction. The case of *Andrews v. Boughey* quoted at the Bar, was referred to as a distinct authority, and Mr. Baron Alderson is reported to have said that “by the substitution for a sum of money, of a *piece of paper*, or a *stick of sealing wax*, a

bargain may be carried out in its full integrity."

It may perhaps be convenient to transcribe such portions of the report of *Sibree v. Tripp* as bear reference to the question raised in the principal case. To assumpsit on a Promissory note for 50*l.* with counts for 1,000*l.* for money had and received, and on an account stated, the defendant pleaded "as to 500*l.* parcel of the said sum in the second and last counts mentioned, that the said account stated was stated of and concerning that sum; and that after the causes of action arose, the plaintiff commenced an action of debt for the recovery of the said sums of 500*l.* and 500*l.* in the Tolzey Court at Bristol; that the defendant disputed the debt, and denied that he owed or was liable to pay or that the Plaintiff could recover the same; that thereupon, to terminate the said dispute, and the claim and demand of the plaintiff, and finally to determine the action, the plaintiff and defendant agreed that the said action should be settled by the defendant making and delivering to the plaintiff three promissory notes for 125*l.* 125*l.* and 50*l.*; and that plaintiff should accept and receive the same in full satisfaction for and in discharge of the sums of 500*l.* and 500*l.* and all damages and costs; and that the plaintiff should discontinue the action. The replication traversed the making of the agreement. At the trial it was objected that, in

order to support the above plea, it was necessary to show, not only that the notes had been given in satisfaction, but also that they had been paid. The learned Judge was of opinion the plea was proved, without evidence of payment, and he accordingly directed a verdict for the defendant upon that issue, reserving leave to move to enter a verdict for the plaintiff for 200*l.*

Pollock. C. B. "The other part of the rule is to enter judgment for the plaintiff, *non obstante veredicto*, on the ground that the giving of these notes could not in point of law be a satisfaction of a liquidated claim for a larger amount. If the case of *Cumber v. Wane* were law, and a binding authority on us, undoubtedly we could not come to a conclusion in favor of the defendant. That case was *indebitatus* assumpsit for 15*l.* to which the defendant pleaded that he gave the plaintiff a promissory note for 5*l.* in satisfaction, and that the plaintiff received it in satisfaction; and it was held on writ of error, after judgment for the plaintiff, that the plea was ill. It does not appear that the note was payable presently or whether it was negotiable or not. The facts are not sufficiently stated to make it a binding authority. Pratt C. J. says, in delivering judgment, "as the plaintiff had a good cause of action, it can only be extinguished by a satisfaction which he agrees to accept, and it is not his agreement alone that is

sufficient, but it must appear to the Court to be a reasonable satisfaction; or, at least, the contrary must not appear, as it does in this case. If 5*l.* be, as admitted, a satisfaction for 15*l.* why is a simple contract to pay 5*l.* a satisfaction for another simple contract for three times its value? In the case of a bond, another has never been allowed to be pleaded in satisfaction, without a bettering of the plaintiff's case as by shortening the time of payment." From the latter part of the judgment I must, with every respect for the great authority of that learned judge, express my dissent. Undoubtedly at that time it was not law; for in *Pinnel's case* 5 Rep. 117, it was laid down as clear law that in the case of a bond for 500*l.*, due on the 1st January, if the obligee accepted 100*l.* in satisfaction the day before, he was at liberty to do so: and the Court never enquired whether the satisfaction was reasonable; they left it to the agreement of the parties. Besides which it does not appear in the case of *Cumber v. Wane*, that the promissory note was negotiable, and therefore that the plaintiff had any benefit from it. The marginal note of that case is—"Giving a note for 5*l.* cannot be pleaded as a satisfaction for 15*l.*" and this was expressly denied to be law by Lord Ellenborough, in argument, in *Heathcote v. Crookshanks*, 2 T. Rep. 24, and Buller, J. referred to a case of

Hardcastle v. Howard Ibid, 28, in which it had been so denied to be law. But whether the case of *Cumber v. Wane* has been overruled or not, it appears to me that it cannot be sustained as an authority that the acceptance of a negotiable security may not be a satisfaction of a claim to a larger amount. *Sard v. Rhodes* 1 M. & W. is a distinct authority that the acceptance of a negotiable security may be pleaded in satisfaction of a simple contract debt for a like amount: and the only question is, whether the same doctrine is applicable when the original claim was for a larger amount. I think it is. It is admitted that if there had been an acceptance of a *chattel* in satisfaction of the debt, the Court would not examine whether that satisfaction were a reasonable one, but merely whether the parties came to that agreement; and the acceptance of a negotiable security appears to me to be of the same nature."

Parke, B. "The next question is whether this is a good plea in law: I am of opinion that it is. It is clear that if the claim be a liquidated and ascertained sum, payment of part cannot be satisfaction of the whole, although it may, under certain circumstances, be evidence of a gift of the remainder. But the gift of a thing of uncertain value may be a satisfaction of any sum due on a simple contract: if the contract be by bond or covenant it must be a

thing of an equal or higher nature, but upon a mere simple contract the debtor may give any thing of inferior value in satisfaction of the sum due, provided it be not part of the sum itself. Littleton so lays it down, s. 344. 'Also in the case of feoffment in mortgage, if the feoffor payeth to the feoffee a horse or a cup of silver, or a ring of gold, or any such thing in full satisfaction of the money, and the other receiveth it, this is good enough, and as strong as if he had received the sum of money, though the horse or other thing were not of the twentieth part of the value of the sum of money, because that the other had received it in full satisfaction.' The same doctrine is laid down in *Pinnel's case*. Again a sum of money payable at a *different time* is a good satisfaction of a larger sum payable at a future day. *Com. Dig.* tit. Accord. (P.) In the present case the satisfaction is by giving a *different thing*, not part of the sum itself, and having different properties. It *may be* of equal value, but that we cannot enter into, it is sufficient that the parties have so agreed." The learned Judge then referred to *Andrews v. Boughy* in the terms quoted at the Bar, and proceeded. "It seems to me that this reasoning applies to the present plea, because here a different thing, of uncertain value, is delivered in satisfaction of the debt. The cases of *Cumber v. Wane* and *Thomas*

v. Heathorn have been referred to. The reasoning of Pratt C. J. in the former case is certainly not correct, for we *cannot enquire into the reasonableness* of the satisfaction. But it did not appear that the note was negotiable, and the point now before the Court was not made."

Alderson B. "This is a liquidated demand. Then is there a good answer to it? The suggested answer, is that the defendant gave certain promissory notes, of a smaller amount, and the plaintiff accepted them in satisfaction and discharge of that demand. It is undoubtedly true, that payment of a portion of a liquidated demand in the same manner as the whole liquidated demand ought to be paid, is payment only in part: because it is not only one bargain, but two; viz: payment of part, and an agreement, without consideration, to give up the residue. The Courts might very well have held the contrary, and kept the matter to the agreement of the parties; but undoubtedly the law is so settled. But if you substitute for a sum of money a piece of paper, or a stick of sealing wax, it is different, and the bargain may be carried out in its full integrity. A man may give in satisfaction of a debt of 100*l.* a horse of the value of 5*l.* but not 5*l.* Again, if the time or place of payment be different, the one sum may be a satisfaction of the other. If for money you give a negotiable secu-

urity you pay it in a different way. The security may be worth more or less; it is of uncertain value. This case falls within the rule of law referred to."

There can be no doubt that the mere substitution of a chose in action, according to the old authorities is no defence unless that which is substituted is of a higher nature; for that is concord executory simply and cannot operate as a bar to a debt which is certain. *Balstone v. Baxter*, Cro. Eliz. 304; *Lovelace v. Cocket*, Cro. Car. 85; So in Cro. Eliz. 716; Ibid 727; Cro. Jac. 579; Ibid. 650; 1 Mod. 225; 2 Keb. 851; 1 Rol. Abr. 470.

In such cases the necessity is obvious of setting out the substituted contract and the facts relative to it; for without such statements the Court could not possibly judge of the terms and nature of the accord and satisfaction.

The case of *Sibree v. Tripp* goes the length of deciding that the acceptance of a negotiable security in satisfaction of a claim to a larger amount may be pleaded, without stating the value of the thing taken, or the reasonableness of the satisfaction. If this decision be law, it applies with greater force to the principal case where the demand is unliquidated and the alleged accord and satisfaction is the acceptance of an instrument, not stated to be negotiable or in substitution of a chose in action, but one whereby the plaintiff's previous right to sue is altogether defeated;

in fact a concord executed at the time of, and by the very act of the acceptance.

The non-negotiability of the indenture may be ground for urging a distinction between the principal case and that of *Sibree v. Tripp*; but a bill or note, when it does not confer a right of action on the party taking it, (for the property may be in others than those who have a right of action on the instruments, *Wans v. Keymer*, 1 B. & Ad. Bull v. Fancourt 1 B. N. C.) may be considered as a chattel and of value to the party giving it, *Stavart v. Eastwood*, 11 M. & W. In such a case, even if the instrument were not negotiable, and no interest beyond bare possession were conferred on the taker, still the defendant, by his surrender of it, would have incurred a detriment which would render it unnecessary and immaterial to consider whether plaintiff had received a benefit. *Tipper v. Bicknell*, 3 B. N. C. *Bainbridge v. Firmstone*, 8 A. & E.

Now pleas of the acceptance in satisfaction of a chattel of some though uncertain value, have always been considered good, even when the demand was in the nature of a debt and certain. *Blake's* case; *Peytoe's* case; and *Pinnel's* case, Coke. *Maillard v. Argyle*, 6 M. & Gr. per Maule J.

A distinction too has always been drawn between the case of a duty for the mere payment of money, and one for the performance of a col-

lateral act. If the indenture then be considered a *chattel*, it would seem to be unnecessary in the case of concord *executed* by acceptance of it, to set out in pleading its value or consideration. In *Sibree v. Tripp*, indeed, this appears to have been admitted. The case suggested at the bar (almost identical with that put by Mr. Baron Alderson in his judgment,) viz. "that the mere acceptance of a piece of paper or sealing wax would be a good bar," may be perhaps thought an extreme illustration, for all the instances, or nearly so, in the old authorities are of things not merely of some but of *substantial* value, viz. silver, gold, a horse a ring, &c. whence the Court could infer, that they possessed an intrinsic worth, independently of their equivalent value in money. But it may be asked upon what principle is the statement of value to be defined? If it be enough to state a trifling though uncertain value, the question of reasonableness or unreasonableness would never arise. In *Young v. Rudd*, 1 Raym. 60, in *indebitatus assumpsit*

the defendant pleaded that he gave to the plaintiff a beaver *hat*, in satisfaction of the promise, and that the plaintiff accepted it. The plea was objected to, but held good. Now a hat, without descriptive words (such as a *new hat*, &c.) may be, and indeed is generally considered an article of very *questionable* and *uncertain* value, and yet if the criterion is to be founded on inference of its intrinsic worth, why may not the value of a piece of paper, or stick of sealing wax, or an indenture, be inferred with equal consistency.

The true principles of pleading, however, would seem to require that consideration of some sort should be shown. In cases where the consideration has been the mere delivery of some document conferring no right, and in which the plaintiff neither has or could take an interest from the party surrendering it, circumstances, giving the document value, are always disclosed on the face of the *plaint* or *declaration*. There is no reason why the same rule should not be strictly applicable to *pleas*.

1847.

July 13.

Tuesday.

Pleading.

Parties,

Curators' Act

No. XIX. of 1841.

Construction of.

B. D. (a creditor of one L. M. deceased) filed a simple creditor's bill (after having, on his own application, procured the appointment of the Ecclesiastical Registrar as curator of the property of L. M.) against one A. Sein and the representatives of L. M. making the curator a party defendant, and alleging generally that through the connivance and collusion of A. Sein and the representatives of L. M. the curator was unable to ascertain who had obtained possession of the property of L. M. since his death.—*Held* that the suit was defective, inasmuch as the curator represented the estate of the deceased, and ought to have been the party Complainant in the absence of any express allegation or proof of fraud or collusion or insolvency on his part.

In Equity.

BHGOBAN DOSS *v.* ANUNDCHUNDER SEIN ; RAJARAM BUNGSEE ; RAMCHUND AND JUGGOMOHUM MISSEER, AND R. O'DOWDA, curator, &c.

BILL by a simple contract creditor, on behalf of himself and all other creditors coming in and contributing, praying an account of the real and personal estate, property, and effects of one Luckhoo Misser, deceased, possessed by or come to the hands of the defendants, or either of them, and for the application thereof to the payment of L. Misser's debts, &c. and for a receiver; and an injunction to restrain the defendants from further intermeddling in the management or administration thereof.

The bill stated the following facts. Bhogoban Doss (the complainant) previous to the year 1830 had been carrying on business in Calcutta as a merchant. At that period, wishing to keep up a branch establishment at Lucknow, in connection with his Calcutta cotee, he proceeded to Lucknow, having previously appointed one Luckoo Misser (the father of the defendants bearing that name) his manager of the cotee in Calcutta: giving him authority to collect his debts (alleged to amount to Rs. 50,000) and delivering over to him money, and securities for money, and his stock in trade, consisting of gold and silver articles, and precious stones (to the alleged value in the whole of Rs. 20,000.) He also appointed his son to superintend the business in Calcutta, jointly with Luckoo Misser. This son died soon afterwards. Luckoo Misser, about the same time, also fell sick and died. The bill charged, however, that before his death he set up business on his own account, with the funds of Bhogoban Doss: that during his last illness, and in contemplation of death, he sent for the defendant, Anundchunder Sein, and delivered to him the key of his

iron chest and money, as well as hoondees and jewels, and other property, for the purposes of administration; and that Anundchunder retained the same after Luckoo's death, and that the relatives of Luckoo had, through the fraud and connivance and assistance of Anundchunder, obtained possession of the whole or greater part of the estate of Luckoo Misser. The Ecclesiastical Registrar had been appointed curator of the estate and property of Luckoo, on the application of the complainant himself, under Act XIX. of 1841 and it was stated that he was unable to ascertain into whose possession the property had fallen. The answer of Anundchunder denied that Luckoo had delivered to him during his last illness, or at any time, the property in question, but admitted that the key of the iron chest had been deposited with him for safe custody; that after Luckoo Misser's death he gave up the key to his family, having given notice to the curator of the time and place and of his intention so to do (the curator having previously required Anundchunder not to deliver up any thing in his possession belonging to the estate of Luckoo Misser.) Anundchunder also, by his answer took the objection of want of privity as regarded himself, and craved the same benefit as if it had been taken by demurrer.

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Mr. *Clarke* and Mr. *Ritchie* appeared for the complainant.

Mr. *Morton* and Mr. *Taylor* for A. Sein.

Mr. *Prinsep* and Mr. *Theobald* for the other defendants.

The Court after hearing the statement of the complainant's case, intimated, that it was impossible for the suit to proceed, without making the curator a party complainant.

Mr. *Clarke* and Mr. *Ritchie* in answer to this objection.—
The curator cannot properly be made a complainant,

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as he has no power given him, enabling him to sue, in any one of the clauses of the Act: and he cannot go beyond the limits of the powers assigned to him.

The preamble of the Act is thus worded—"An Act for the protection of moveable and immoveable property against *wrongful possession* in case of *successions*," and the 1st Section recites "that whereas much inconvenience has been experienced, where persons have died possessed of moveable and immoveable property, and the same has been taken upon pretended claims of right by gift or succession." Now here there is no disputed succession.

[*The Chief Justice.*—The last section explains. It is there enacted "that whenever a person dies leaving moveable or immoveable property within the local limits of the Jurisdiction of any of H. M.'s Supreme Courts and such Court shall be satisfied that danger is to be apprehended of the misappropriation and waste of the property before it can be ascertained who may be legally entitled to the succession to such property it shall be lawful for the Court to authorize and enjoin the Ecclesiastical Registrar or one or more curators to *collect* such effects and hold or deposit or invest the same in such manner and place and upon such security and subject to such orders and directions as the Court may deem expedient." Here a curator has been appointed, and he is the representative, consequently, of the whole estate, and is entitled to collect assets in cases of misrepresentation. The unanimous opinion of the Bench has been already given, that the curator has the power to sue. There is no reason to suppose the legislature would have given the power to collect assets and deprive him of the power of suing in order to recover them. The legislature certainly did not intend by this Act to abridge the powers of the curator; and from the circumstance of the

appointment of one, it may be presumed, that such a guardian of the property was here necessary.]

The curator, in fact, is only a minister ad colligenda: he has no power to pay debts: this suit therefore may be maintained ex necessitate. Then the case is one in which collusion is expressly charged. We show that it has become impossible, in consequence of the connivance between these different parties, to ascertain in the hands of which of them, the property of the deceased has been secreted; whether of A. Sein (who was agent and trustee of Luckoo Misser) or whether of the Missers, (his representatives): or whether his estate is partly in the possession of both or either. This objection has not been raised by the answers.

SIR L. PEEL, C. J. The curator is the proper party complainant in a suit against debtors, and in order to make him a defendant the bill must charge fraud and collusion, or insolvency—neither is suggested here. This Court has on a previous occasion expressed their opinion on the construction of this clause of the Act, under which the powers of the curator are derived. (a) It treats his appointment as analogous to that of a receiver. We think the power to collect debts, &c. contains, by implication, a power to sue for their recovery. There can be no doubt of the intention of the legislature to confer such a power, where it became necessary to exercise it. The Court do not say that, if the appointment was obtained behind the back of the proper representatives, they would be thereby displaced: but it is not for the party at whose instance the curator has been appointed, to dispute the necessity of the appointment; for the application, it must be presumed, was made for his benefit, and granted on a proper case first made. The appointment can only be

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SEIN.

(a) Not reported.

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obtained during the suspension of the proper representation. No hardship can therefore be complained of in this particular instance. The complainant is a mere creditor of the estate of the deceased. If he proceeds against those who, by reason of possession of assets, are debtors to the estate, he cannot do so *per saltum*—he must either sue them through the legal representative, or, if he joins them in a suit against the representative, he must connect the parties, and allege and prove collusion. Here there is no allegation to that effect. If the curator is a mere formal party and has no authority to collect debts, &c. then it might follow that the Mitters are the true representatives: on the other hand, if the curator possesses the administration of the estate, and has authority to collect debts, &c. it follows that that operates as a suspension of the right of the representatives to collect *ad interim*. To allow the suit to proceed at the instance of one creditor, without the intervention of the legal representative would be to make the debtor liable to two suits. A creditor's right to sue debtors at all, does not proceed upon any general rule; but rather upon an exception to it, the doctrine is limited, and cannot be extended beyond the limits, which the decided cases assign. This case does not fall within the recognized principle, and the Court cannot extend the rule to meet a case of supposed hardship arising from the party's own acts.

Bill dismissed; as against A. Sein without costs, he having taken the objection of want of privity by his answer.

*Plea Side.*GEORGE SMITH *v.* JOSEPH WILLIS & WILLIS EARLE.1847.
July 14.
Wednesday.

TROVER for title deeds. The defendants pleaded 1st not guilty, 2ndly not possessed, 3rdly a special plea alleging the property in the deeds to be in one Benjamin Walter Lazarus and that he had deposited them with the defendants as a security for past and future advances with a power of sale of the lands (to which the deeds pertained) on default in repayment:—that the monies advanced had never been repaid; and that the defendants had no notice that Lazarus was not the bona fide owner. There was also another plea similar to the last, stating the property in the deeds to be in Lazarus and Anne, his wife, and a deposit by them as a security for the debt of the former.

It appeared at the trial that the land in question (which had been purchased by the wife shortly after her marriage out of certain funds, the produce of the sale of her jewels and personal ornaments,) was, by a voluntary post-nuptial settlement, dated 23rd April 1840, (which stated the consideration money for the purchase viz. Rs. 700 to have been Mrs. Lazarus' own money) conveyed to one Henry Cook, as trustee for Mrs. Lazarus, "to such uses as she, notwithstanding her coverture and as if she were sole and unmarried, might by deed or will appoint." The former trustee having declined to continue to act, the present plaintiff, by an indenture, September 24th 1846, was substituted in his stead. The title deeds remained in the possession of the wife from the time of the purchase. Lazarus was then, and had been for some time, carrying on the business of a cabinet maker and upholsterer in Calcutta, and was considerably indebted to the defendants. In his evidence he stated that the latter had some time previously required him to

*Trustee—Trovee
Plea of not possessed,—defence under.*

One Lazarus; (being at the time largely indebted to the debts. Messrs. Willis and Earle) by a post-nuptial settlement conveyed to a trustee for the sole and separate use of his wife, certain property, the title deeds whereof subsequently got into the hands of the defendants, who refused to give them up, claiming a lien on them in respect of their advances to Lazarus. Six years after the conveyance was made, Lazarus took the benefit of the insolvent act. *Held* that the legal estate, being in the Trustee, he was entitled to maintain trover against the defendants; *held also*; that, whether the deed were fraudulent or not under the Stat. of Eliz. c. 5. the rights of creditors could not be discussed under the plea of "not possessed" in this form of action.

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make over the deeds in question to them, as a security for his debt, that he assured them he could not comply, inasmuch as the lands belonged to his wife, and he had no interest whatever in them, but on their expressing a wish to satisfy themselves, by an inspection of the deed, he persuaded his wife to deposit the documents with them for that purpose. They subsequently refused to deliver up the deeds, claiming a lien on them for the repayment of their advances to him, which far exceeded the value of the property, which had been built upon since the purchase and considerably improved in value. On cross examination, Lazarus denied that he had ever induced the defendants to suppose that his wife had consented to deliver up the deeds as a security for his debt, or that she could obtain the acquiescence of her trustee.

In 1846 Lazarus took the benefit of the Insolvent Act, and in an amendment of his schedule, filed 24th February, of that year, he described the property thus "there is a house at Ballygunge purchased after my marriage, with money which I consider belonged to my wife, and the conveyance thereof was made to Mr. Cook, as trustee for my wife; there was no marriage settlement: whether I am entitled to the house or not I submit to the judgment of the Court."

The defendants had also sued out execution and seized the property, through the sheriff, under a bond and warrant, which they had previously obtained from Lazarus.

For the defendants, evidence was given showing that Lazarus was largely indebted to them at the time of the conveyance, and that Mrs. Lazarus had assented to the deposit, merely stipulating that the property should not be sold: and it was contended that the deed was a voluntary post-nuptial conveyance, made by a debtor in fraud of creditors, and rendered void at law by the Statute of

Elizabeth (a) the property therefore was available for debts, and could be followed and seized.

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The Court were of opinion that the special pleas were not proved, and found a verdict for the plaintiff upon all the issues, reserving leave to the defendants to move on the above grounds on the plea of not possessed, at the same time observing that, though this was a voluntary settlement after marriage, by a person largely in debt at the time, yet there did not appear to be any *actual* fraud in the transaction.

A Rule Nisi having been accordingly obtained ;

Mr. *Morton* showed cause. The question here is not whether lands may be followed in a Court of Equity where the husband might be declared a mere Trustee ; or whether this deed was executed in fraud of creditors, and the land therefore liable to be seized in execution by creditors ; but the question simply is, whether a trustee in whom the legal estate is vested, has such a right to the possession of the conveyance as entitles him to maintain trover.

[*The Chief Justice*—Suppose a debtor to sell one estate and buy another, and settle that to the sole and separate use of his wife ; such a settlement would be void only as against creditors, and would create but a simple resulting trust to himself. Is that extendible ? A mere naked trust is extendible. It is within reach of an *elegit*, and therefore within the charter writ of *fieri facias* which is more ample.]

There is no estate created by this deed in favor of the husband, which can by any possibility be seized under a writ of *fieri facias*, and as there is no plea of fraud as against creditors, the trustees have a right against all the world, except creditors, and may bring trover, even

(a) 13 Eliz. c. 5. tit. Fraudulent Conveyances.

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against the cestui que trust, a fortiori against parties in the position of these defendants, who merely claim to have had the deeds deposited with them by the husband. If the deed is set aside, the estate would be in the parties conveying. The husband never had the estate in him, and the statute of Elizabeth cannot operate so as to create an estate in a party, who never had it. Now the plaintiff is possessed in law of the title deeds, and he has the legal estate, having been substituted for, and taken the conveyance from the former trustee. There was certainly some evidence to show that the wife deposited the deeds with the defendants with a view to induce them to suppose that she would procure a conveyance, and get the trustee to acquiesce, but it was neither contended nor proved that the *latter* had ever acquiesced or assented to the deeds being deposited with the defendants. The objection raised does not seem to have any application under the plea of not possessed. The statute of Elizabeth speaks of avoiding fraudulent instruments as against those *only* who may suffer from the fraud: the deed may be valid as against all other parties. A right exists notwithstanding in the person having the legal estate to bring trover; for a party himself innocent of fraud, may sue for the recovery of even a void deed.

[*The Chief Justice.*—That is so: the question under the statute moreover is not raised on this plea.]

The Court then called on

Mr. *Clarke* and Mr. *Sandes* in support of the rule. The deed under which the trustees claim is a fraudulent one; the property in question therefore was available, and liable to be seized by the sheriff.

It was the separate property of the wife to any uses she might appoint; she did not appoint, and therefore there was a resulting trust to the husband. The right

to the lands takes with it the right to the deeds. The trustees have no right to the deeds, because the lands are open to the creditors by virtue of the statute of Elizabeth, *Spears v. Rogers*. (a) In *Townsend v. Westacott* (b) a person largely indebted made a voluntary settlement, and became insolvent within three years ; that was considered sufficient to avoid the settlement under the Act. It was also held that in order to set it aside, it was not necessary to prove that the settlor was in a state amounting to insolvency. The Master of the Rolls is there reported to have said that, even if the evidence fell short of the party being indebted to the extent of insolvency, he should still have decreed the instrument invalid, had the evidence of the extent to which the party was indebted at the time been satisfactory. At all events it was not an honest and proper proceeding for any man in Lazarus' then position to have made this voluntary settlement, and that circumstance, according to *Townsend v. Westacott*, is sufficient of itself, without proof of *actual fraud*, to avoid the conveyance.

[*The Chief Justice*. The person having the legal estate is entitled to maintain trover. The legal estate is in the trustee, and must first be got out of him: the husband never had any estate.]

The legal estate did not pass to the trustees, if the deed was fraudulent, and made in contemplation of insolvency. The question is, can the trustees claim under a fraudulent conveyance ?

[*The Chief Justice*. There is no reason why they should not: they are not parties to the fraud. The deed is only void against certain parties. The wife might, if she pleased, pay off the debts of creditors, and defeat the effect of the intended fraud on them, and so have a right to retain the land. No creditor has a lien on lands

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(a) 3 B & Ad. 362.

(b) 2 Bea. 340.

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until he has obtained a judgment: in an action by a trustee in trover, it is impossible to raise the question as to the rights of creditors.]

Then the debts ought to be paid before the wife can insist on her rights. In this form of action the plaintiff must show a right to the possession. Now the plaintiff was never possessed, for his appointment as trustee was subsequent to the deposit of the deed with the defendants. Evidence was given of the seizure of the lands by the sheriff by which they became bound. If the deed is void on the ground of fraud (even though it might subsequently be made good) still here the right to the possession is not shown. A lien may be given in evidence under not possessed: and if the proofs here show that these deeds are properly in the possession of the defendants, that is a sufficient answer to the action under this plea.

SIR L. PEEL, C. J.—In this case a conveyance to the plaintiff as trustee for the wife has been proved. The legal estate is therefore in the trustee, who is entitled to bring his action of trover for the recovery of the title deeds. To divest the trustee's estate, the seizure by the sheriff of his property, as the husband's, is insufficient, and that circumstance alone would constitute no defence to this action. The legal estate must first be divested from the trustee. The mere fact of the deeds having remained in the wife's possession does not affect the trustee's right to obtain them at any time. It is admitted that her estate is purely equitable, and if it had been distinctly proved that she had deposited these deeds with the defendants, that deposit would have conferred merely an equitable title, and would not have defeated the right of the trustees to recover in this action. The verdict must, therefore, be retained.

Rule discharged.

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GEORGE SMITH *vs.* JAMES PELHAM MACKILLIGAN,
Sheriff, &c.

1847.

July 14.

Wednesday.

TRESPASS against the sheriff for breaking and entering a close, dwelling house, and garden of the plaintiff, situate in Ballygunge, in the district of the 24-Pergunnahs, and damaging the property. Pleas—1st not guilty; 2ndly not possessed; 3rdly. a justification under a writ of fieri facias, at the suit of Joseph Willis and Willis Earle, against one Benjamin Walter Lazarus.

The trespass above complained of is the same as that referred to in the report of the preceding case. Lazarus, being considerably indebted to Messrs. Willis and Earle, the latter, in January 1847, entered up judgment upon a bond and warrant obtained from him some time previously, and thereunder issued execution, and seized (among other property) the land in question, (already stated to have been conveyed by a post-nuptial settlement to the sole and separate use of the wife of Lazarus) as the property of their debtor. The plaintiff was constituted a trustee in the place of the former one (who declined to act,) and as such, subsequent to this seizure, made an entry on the premises in question with a view to retake possession. He there found several burkandazees and sheriff's peons in charge, who informed him that they were placed there by the orders of Messrs. Willis and Earle. The plaintiff then told them that he had come to take possession and demanded to be reinstated. A report was made of the circumstance to Dyalchund Seal, the dewan or principal baboo in the sheriff's office, but no communication at all was made to the sheriff himself, or to the deputy sheriff, or to Mutty Loll Seal, the sheriff's banian or chief dewan, to whom such reports were referred in the usual course of business of that office.

*Tresspass—Sheriff
Notice to him
of change of title
and entry
after seizure—
when necessary.*

Certain lands, (secured by a post-nuptial settlement in trust to the sole use of the wife,) were seized by the Sheriff for a debt of the husband. Subsequent to the seizure, a change of trustees was effected. The new trustee forthwith entered on the lands, in order to retake possession, and upon the sheriff holding over, brought his action. *Held* that, (assuming an action would lie against the Sheriff, for so continuing in possession, after notice of such devolution of title and entry;) still notice thereof ought in the first instance to have been given to him.

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The deed of settlement was also proved, as well as a written notice to the sheriff of the title of the plaintiff as trustee. It was objected that there was no evidence to connect the sheriff with the continuing seizure, or that he had any knowledge or notice of the subsequent entry.

The Court considered the objection fatal, and nonsuited the plaintiff, reserving leave to move. A rule was accordingly obtained to show cause why that nonsuit should not be set aside, and a verdict entered for the plaintiff, or why there should not be a new trial.

Mr. *Clarke* and Mr. *Sandes*, showed cause;—and were stopped by the Court, who called on the Counsel for the plaintiff.

Mr. *Morton* in support of the rule. There is no principle of law which requires that notice of the change of ownership, or of the new owner's attempted entry, should be given to the sheriff. Notice indeed of the former fact had been given to the sheriff's office in the usual way; and even the latter had been communicated to a subordinate in the office. As the Court, however, decided when the rule was moved for, that such a notice (supposing a notice to be necessary at all) was insufficient, this argument will be confined to the point whether any notice whatever was legally requisite. Now it is necessary to consider what order the sheriff in substance gives to his bailiffs on the seizure of specific property under a writ of fieri facias. The order virtually is not only to seize, but to remain in possession until countermanded. If the property is not the property of the party against whom the writ has issued, the sheriff is liable for all the consequences of such order. Suppose the ownership were changed between the time of giving the order and the actual seizure by the bailiff:—will it be contended that notice of that fact must be given to the sheriff to consti-

tute him a trespasser against the new owner? The principle is the same where the change of ownership takes place after the seizure and before possession is relinquished. The continuance in possession by the sheriff's bailiff under the sheriff's original order, is as much the act of the sheriff in law as the original seizure. To hold otherwise would be to import some supposed condition into the order given, or presumed to be given by the sheriff to his bailiff. The order is absolute, and unqualified, or at least must be presumed to be so. The law will not permit the sheriff to say that he directed his bailiff to seize and hold only during the subsisting ownership, or during some other undefined period. The cases in which it has been held that the sheriff is not liable for the acts of his bailiff, done without authority, and wholly beyond the scope of his employment, have no application to the present case. The continuance of possession by the bailiff is within the scope of the original order, which he receives from his principal, and until the order is countermanded, it is the continuing act of the sheriff, even though an event may supervene of which the sheriff receives no notice, and which was, perhaps, never contemplated by him. The argument of the other side seems to amount to this,—that on a change of ownership the sheriff is entitled to a *locus penitentiae*; for it is said, non constat, that he would not have countermanded his order had he known of it. But what is the authority for such a position? It is submitted that there is none to be found, and that the sheriff is no more entitled to notice of the event which has happened than of any other intermediate change of circumstances.

SIR L. PEEL, C. J.—A continuando is allowed to prevent a multiplicity of actions in trespass, which suffices to show that trespasses on the same lands, under different ownerships, cannot be treated as one continuing trespass.

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Notice to the sheriff of the subsequent entry is therefore necessary, and the only ground for treating it as unnecessary is by connecting the trespasses with a continuando, which in our opinion cannot be done.

The case of *Chambers v. Bernasconi*(a) may be referred to with reference to the connection of the sheriff with acts of his officers. The person called the sheriff's banian is not a person whom the law recognizes. The Court has no knowledge of his duties, and evidence should have been given of the nature of the actual authority conferred upon him. The evidence however does not show that the notice reached even his banian. The proof of notice was clearly inadequate—the attempt also here was experimental—the original trustee of the property settled on the wife would not contest the claims of the creditors of the husband: therefore it was arranged that the property should be conveyed to a new trustee, which was done after the seizure by the sheriff. An entry was made then on the property, and this entry it was contended sufficed to make the *sheriff* a trespasser against the new trustee. At that time the sheriff himself was not actually in possession, nor had he, in fact, given any orders as to any new seizure on continuing possession subsequent to this devolution of title; and, assuming that he might have been treated as a trespasser in continuing possession, (on evidence of authority express or implied given by him to the bailiffs to continue their possession,) after notice of the new title and consequent entry; still, as a requisite step towards establishing the plaintiff's right, such notice would in that case have been necessary.

Rule discharged.

(a) 3 Law. J. (N. S.) Ex. 373; 2 C. M. & R. 347; & 4 Tyr. 531.

In Equity.

LLEWELLYN *v.* O'DOWDA assignee of Stocqueler, an insolvent.

BILL filed for the purpose of enforcing a second mortgage upon the "Englishman" newspaper to the amount of Co.'s Rs. 4,500 with interest.

The first mortgage had been jointly held by several agency houses, to the extent of Co.'s Rs. 70,000. On the insolvency of Mr. Stocqueler, the paper was purchased by the late proprietor, (Captain Macnaghten) and the purchase money realized a sum much more than sufficient to pay off the first mortgage. The greater part of the surplus, however, was divided by Mr. Alexander, the former assignee, (who entertained some doubts as to the validity of the second mortgage,) amongst the general creditors of the insolvent.

An order nisi had been issued from the Insolvent Court, calling upon the complainant to show cause why his claim should not be proved within a certain time or *disallowed*: but he did not appear in that Court in pursuance of the order.

Mr. *Cochrane* and Mr. *Morton* appeared for the complainant.

Mr. *Sandes* for the assignee, admitted that the defendant could not resist a decree passing against him: but he urged that the complainant ought not to be allowed his costs of suit out of the estate; because if he had appeared in the Insolvent Court, in conformity to the order calling on him so to do, this suit might have been rendered unnecessary. Besides the assignee had acted on the opinion given on a joint reference of the question by the parties.

1847.

July 23.

Friday.

Mortgage.
Insolvent Court,
jurisdiction of.
Costs.

A mortgagor, (after mortgaging certain property a second time) became insolvent: an order was issued from the insolvent Court, requiring the second mortgagee to come in, and prove his claim:—This he declined or neglected to do, but subsequently instituted a suit in this Court.—*Held*, that under the circumstances, the 2nd mortgagee was not entitled to his costs of suit out of the insolvent's estate.

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Mr. *Cochrane* and Mr. *Morton* contra contended,—that the order of the Insolvent Court was without jurisdiction and therefore wholly inoperative: for that Court had nothing to do with the claim of the second mortgagee, which was altogether unanswerable.

The decree was granted as prayed, but the Court took time to consider the question of costs.

July 26.
Monday.

SIR L. PEEL now delivered judgment.

The question reserved by the Court for consideration in this case is, whether the complainant should have his costs of suit. The Court was inclined not to allow them, because it appeared to them that a resort to the Insolvent Debtor's Court, (where the estate of Mr. Stocqueler the insolvent and the mortgagor was under distribution) would have given the complainant full relief, at no cost to himself, and at a trifling cost to the estate. He had notice to appear there. It was argued in opposition to this that the Insolvent Court had no jurisdiction over the case of a second mortgagee, which the complainant was. It is necessary therefore to explain the grounds and extent of the jurisdiction of that Court. The insolvent must insert in his schedule all debts that he owes, consequently mortgage debts, and he must state the securities in the hands of creditors. There is so far no difference between a first and second mortgagee. Any creditor may impeach these debts, for it is obvious that a collusive and fraudulent transfer of the insolvent's property with a view to defraud his creditors, may be made under the disguise of a mortgage. In this case the mortgage was for Co.'s Rs. 15,000, though the sum advanced was under Co.'s Rs. 5,000, and, though no fraud was contemplated, enquiry was necessary. The Court has jurisdiction to enquire into the validity and amount of the debts. It has also jurisdiction to enquire whether mortgaged personal property in the possession of the assignee, was or was not in

the possession of the mortgagor, as reputed owner, with the consent of the true owner, with a view to order a restoration of it by the assignee, in case he should have seized it erroneously under that belief. The Court cannot, it is true, compel a mortgagor whose debt is undisputed, and who is not within the provisions of the section relative to reputed ownership, to realize his securities by a sale in that Court, under the order of the Court, though this may be done by consent. But if the mortgaged property is more than sufficient to cover all the incumbrances on it, it will be for the interest of the assignee to redeem, and as the mortgagor might have done so, so may the assignee. A redemption of course can take place out of court: a suit is only necessary when the accounts are disputed or other difficulties are thrown in the way of redemption. A mortgage under ordinary circumstances is not an objection to the title, nor are mortgages, whether two or more. Therefore the mortgagor may sell, for he can, by redeeming, make a title, and the mortgagee will be forced to convey. And as the assignee cannot know what the property will actually fetch until he treats for a sale, this is a prudent step, and he may by his contract easily protect himself against being forced inconveniently to complete a contract. Therefore the sale, under the circumstances of this case, by arrangement between the first mortgagee and the assignee, was proper, and if the assignee had tendered to the second mortgagee his principal interest and costs, the latter would have been necessarily obliged to convey to the purchasers. Whatever the assignee legally does in the discharge of his duties, he of course does officially as assignee; for his sole right to interfere with the insolvent's estate is derived from his appointment, and the general authority of the Insolvent Court over him as its officer is sufficient to give jurisdiction to that Court, to order him to pay money in his hands to the parties enti-

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tled to it. We have no doubt therefore that the Court has power to direct payment to a second mortgagee after a sale, when the money is in the hands of the assignee. Until the second mortgagor is paid, or, which is the same thing, until the full money due to him is tendered, the equity of redemption, which is mortgaged to him exists in him in full force and effect. In our opinion, therefore, the complainant ought to bear the costs of this suit. He was summoned to a Court having competent jurisdiction to award what was due to him;—he chose not to appear;—had he appeared, the Commissioner would, in all probability have overruled the objection stated by the assignee, if the objection had been insisted on. If that Court had forborne to decide it, this suit would have been necessary. But this was not the case. The complainant forbore to appear, and has stood on his asserted rights, and questioned the jurisdiction of the Insolvent Court, and we think he must suffer for his error, and that the estate cannot be visited with the costs occasioned by that error. As the assignee acted under a legal opinion given on a joint reference of the question by both parties, there is clearly no ground for fixing him personally with the costs.

Decree accordingly,

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Monday.

*Practice—
Injunction
when too large.*

In Equity.

MUTTY LOLL SEAL,

vs.

JOYGOPAUL CHATTERJEE, and others.

A mortgagee of 3-5ths of a joint and undivided talook, filed a bill for foreclosure. Shortly afterwards the whole estate was suffered to be sold for arrears of government revenue. The mortgagee then filed a supplemental bill, praying for an injunction (absolute in the first instance on the ground of waste) to restrain the mortgagee (the registered proprietor) from receiving *any part* of the *entire* produce of the sale of the whole estate.

Held—that the injunction was too extensive, and ought to have been limited to 3-5ths of the money, as representing 3-5ths of the estate viz. the premises mortgaged.

MOTION for an order that the injunction awarded in the above cause on the 19th of July 1847, against Joy-

gopaul Chatterjee, one of the defendants, "to restrain him from applying for or receiving from the Collector of Burdwan, or any other person whomsoever, any sum or sums of money whatsoever, being the net proceeds of sale (after payment of the arrears of government revenue) of the Talook Lot Poranbattee in the pleadings mentioned, (and which said Talook Poranbattee has been sold by the Collector of Burdwan for arrears of Government revenue), until the said Joygopaul Chatterjee shall have answered the bill of supplement filed in the above cause, or until further order," be set aside for irregularity with costs: or that so much of the injunction as restrains the said Joygopaul Chatterjee "from applying for or receiving from the Collector of Burdwan, that portion of the net proceeds of the said Talook Poranbattee in the supplemental bill mentioned, scil. a six annas and eight gundas portion thereof, amounting to the sum of Co.'s Rs. 14,488-14-6," be dissolved with costs.

The facts of this case, as disclosed upon the affidavits, were shortly as follow. One Tarrachurn Chatterjee, a Hindoo, at his death (amongst other property) bequeathed the talook in question, as a joint and undivided estate, to his five sons, (three of whom were the defendants on record.) Shortly afterwards, two of the defendants, (Gungadhur and Hurreehur,) sold and conveyed their respective shares, (being two-fifths of the whole talook,) to the other defendant, Joygopaul, for Rs. 5,000; who, at the same time conveyed back to them, by way of mortgage, their two-fifths, together with the one-fifth inherited by himself, as security for the payment of the purchase money, which was made payable by instalments, the whole to be due on default in payment of one instalment: this mortgage was subsequently assigned to the complainant Mutty Loll Seal. Joygopaul having failed to pay one of the instalments at the stated period, Mutty Loll filed his bill for foreclosure, and at the same

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time his plaint in ejectment. Neither the proceedings at law or in equity were opposed or defended. The verdict at law was obtained as of course, and, under a writ of *haberi facias possessionem*, Mutty Loll seized the mortgaged premises, and entered into the receipt of the rents and profits. The bill of complaint was subsequently taken *pro confesso*; and the decree *nisi* for foreclosure was made absolute, on Joygopaul's neglecting to attend at the time and place appointed, with the money certified by the Registrar to be due in respect of the mortgage. That decree was set aside for irregularity, and as erroneous, on the ground that the decree *nisi* had been made absolute without taking or rendering any account before the Master of the receipt of the rents and profits, after entry by the mortgagee. (a) Immediately afterwards the complainant filed a supplemental bill alleging (*inter alia*) by way of supplement "that the talook had been sold by reason of default in payment of the arrears of government revenue on the part of the owners of the remaining two-fifths, not mortgaged to the complainant, who had tendered to the collector the amount of revenue due in respect of that portion of the premises mortgaged to him, but it had been refused, on the ground, that, according to the custom of the office, nothing but the revenue of the entire talook could be received. That the estate realised on the sale the sum of Rs. 38,100: that the defendant Joygopaul Chatterjee was about to make application to the Collector of Burdwan for the payment to himself of the whole sum, so realised by the sale of the talook; and as he was the registered proprietor of the entire estate, viz. (of three-fifths in his own right, and of the other two-fifths, as trustee for his two younger brothers) the whole of the money would be paid to him; and, therefore, unless the injunction were granted, the complainant would

(a) Vide *Mutty Loll Seal v. Joygopaul Chatterjee*, ante. 105.

lose the benefit of his security. The injunction was moved for, and obtained, absolute in the first instance, on the ground of irreparable injury, in the nature of waste, (namely, on account of the above sale,) against the whole of the monies in the hands of the Collector, comprising as well the produce of the sale of the three-fifths (mortgaged to the complainant) as of the sale of the other two-fifths belonging to the two younger brothers of the defendants.

Mr. *Taylor* and Mr. *Ritchie* appeared in support of the motion.—This injunction was obtained, absolute in the first instance, upon the ground of *waste*, but no waste at all has been shown; for although (it may be conceded) the act of a mortgagor in allowing his encumbered estate to be sold for arrears of government revenue, may, in some cases, be considered as amounting to waste, scil. in cases where the property is sacrificed, and the value of the mortgagee's securities consequently diminished: yet, here that is not the case; nor is it pretended for a moment that the property was sold at an under value; on the contrary, the fact is, that that portion alone of the talook which was mortgaged to the complainant has realised a sum more than equivalent to the value of the mortgagees' security, and to an amount amply sufficient to satisfy his claim in full. In this instance, then, it cannot be urged that the fact of sale has amounted to irreparable injury in the nature of waste. Besides it was the duty of the mortgagee in possession to prevent the estate from being sold. The complainant's own affidavit shows his knowledge of the custom of the Collector's office, scil. that nothing less than the full amount due could be received: if therefore he wished to retain the estate, he might have tendered the revenue due on the whole property, and the sum paid would have formed a mere item in account between the mortgagor and mortgagee. Such a course

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would not have been attended with very hazardous consequences to the former as, by his own showing, the purchase money of the mortgaged premises alone, exceeds by nearly three times, the debt itself.

Secondly. The injunction is too extensive; inasmuch as it seeks to retain as security for the debt of one person, property belonging to strangers, who are neither parties on record—nor privy to the transactions in question—nor debtors to the complainant, who, under any circumstances, is only entitled to the equivalent of his securities.

Mr. *Clarke*, Mr. *Dickens*, and Mr. *Morton* contra. In all cases between mortgagor and mortgagee, where the estate is in danger of being sold for arrears of Government revenue, or has been actually sold, this Court has held that such acts constitute waste, or danger of waste, in respect whereof an injunction will be granted in terms framed according to the circumstances of the case; either to restrain the anticipated sale itself or stop the proceeds from being appropriated by the party.

As to the second point:—this is a joint and undivided talook; and where that is the case, it is in accordance with the practice of the Court to obtain an injunction directed against the *whole* estate. The defendant Joygopaul is merely trustee for the owners of the other two-fifths, and it is questionable, whether he can in this suit, resist the injunction, in its present form, on behalf of the cestui que trust. If certainly was not through any fault of the complainant that the estate happened to be sold; the affidavit states his readiness to pay the amount of revenue due in respect of such portion of the premises as he possessed by virtue of his mortgage; but as it is the custom of the Collector's office to decline the receipt of any sum other than the *whole* amount due; and as the owners of the other portion refused to pay their quota, the land was put up to auction.

At all events the complainant is entitled to retain the injunction quoad the three-fifths mortgaged, the right to which the defendant Joygopaul has in fact abandoned.

PER CURIAM.(a) The injunction is clearly too extensive, and ought to have been limited to the amount of the monies produced by the sale of the mortgaged premises. Had the circumstances of the case been fully brought to our notice at the time of moving, the terms of the injunction would have been so limited.

Order, that so much of the injunction as is directed against the 2-5ths of the Talook not mortgaged to complainant, be dissolved.

Plea Side.

BEHARRIRAM v. ALEXANDER LYON.

DEMURRER to the rejoinder. The plaint was in trespass against the defendant, as bailiff and officer of the sheriff of Calcutta, for an alleged false imprisonment.

Plea—As to assaulting and imprisoning the plaintiff and keeping him so imprisoned for the time in the plaint mentioned *actionem non*—because he saith that one Sewemberam sued out a writ of *capias ad satisfaciendum* against the plaintiff and one Talooram directed to the sheriff of Calcutta and commanding him to take the plaintiff and Talooram by their bodies to satisfy the claim of Sewemberam of Co.'s Rs. 7,220. The plea then averred that before the return of the writ the sheriff made his

(a) Sir L. Peel, Sir J. Grant and Sir H. Seton.

demurrer assigning as cause, that the bailiff could not dispute the sheriff's authority or orders.
Held also. That the word *duly* did not sufficiently show that the sheriff acted under proper authority.

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Nov. 10.
Wednesday.

Trespass
Pleading—authority
of sheriff to order
release.

Trespass for false imprisonment against sheriff's bailiff. Plea:—justification under the warrant.—Replication—as to portion of imprisonment, that the sheriff *duly* under his hand directed defendant to release plaintiff; but defendant neglected to do so. Rejoinder.—That the debt and costs were unpaid, and the sheriff without the license of the execution creditor wrongfully and unlawfully directed a release.

Held good—On authority or orders.

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warrant in writing sealed with the seal of his office and directed the same to the defendant (who was then and thenceforth continued to be bailiff of the said sheriff) thereby commanding the defendant to seize the bodies of the plaintiff and Talooram to satisfy the sum endorsed on the writ besides costs &c. in due form of law. That defendant thereunder took and arrested the plaintiff and detained him in custody for the time in the plaint mentioned: when the plaintiff against the will of Sewemberam and whilst the said sums endorsed on the writ and subscribed on the warrant remained unpaid and unsatisfied escaped and went at large out of the custody of this defendant so then being such bailiff as aforesaid. Verification and prayer of judgment.

Replication.—As to so much of the plea as relates to the keeping and detaining the plaintiff imprisoned for a certain time to wit twelve days parcel &c. the plaintiff saith that after the said arrest of the plaintiff by the defendant as such bailiff to wit on &c. the sheriff in writing under his hand duly directed and commanded the defendant as such bailiff as aforesaid to release the body of the plaintiff and that it then became and was the duty of the defendant immediately to release the body of the plaintiff whereof the defendant then had notice and then had and received the said command of the said sheriff yet the defendant contrary to the said direction and command of the said sheriff afterwards wrongfully kept and detained the plaintiff imprisoned during the time in the introductory part of the replication mentioned. Verification.

Rejoinder.—And the defendant as to the replication of the plaintiff by him pleaded to so much of the plea as relates to keeping and detaining the plaintiff imprisoned as in the introductory part of the replication mentioned; saith, that at the time when the said sheriff as aforesaid gave the said direction and command in the said replication mentioned to the defendant as such bailiff as afore-

said to wit &c. the plaintiff was in custody in execution under and by virtue of the said writ and warrant as in the said plea mentioned and was not then discharged from such custody and that the said sums of money endorsed on the said writ and subscribed on the said warrant as in the said plea mentioned were then at the time of giving the said direction and command and have since continued to be and still are unpaid and unsatisfied and that the said sheriff without the leave or license and against the will of the said Sewemberam and while the said sums of money were so due unpaid and unsatisfied as aforesaid wrongfully and unlawfully gave the said direction and command in the said replication mentioned wherefore the defendant as he lawfully might for the cause in the plea alleged kept and detained the plaintiff in custody during the time in the introductory part of the replication mentioned in manner and form as in the plea alleged. Verification.

Demurrer.—Assigning for causes that the rejoinder is no answer in law to the replication inasmuch as the defendant (being a bailiff of the sheriff and subject to his orders and commands and liable to be discharged from his office at any moment) has no right or power to dispute the validity or legality of the sheriff's command to release a prisoner in custody. Points also for argument were delivered by defendant to the effect, that the replication was bad on general demurrer, inasmuch as it did not show that the sheriff had proper authority to order a release.

Mr. *Prinsep* and Mr. *Morton* in support of the demurrer. The rejoinder is clearly bad. It in some measure departs from the usual ground of justification, and which was originally stated in the plea, viz : that founded on the warrant to the defendant from the sheriff : it is now based on an alleged defect in the power of the sheriff to release. It relies on the writ alone, not on the warrant.

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The substantial objection to this rejoinder is, that the bailiff, (who is the mere servant of the sheriff,) has no right or authority to question the acts of the latter or object to his orders : if it were otherwise in no case could the sheriff protect himself, or limit or control his responsibility.

[*The Chief Justice.*—Suppose the sheriff himself makes a mistake.]

Then he alone is responsible for his own acts ; the bailiff merely executes the orders which he is bound to obey.

[*The Chief Justice.*—Suppose the sheriff were to order the jailer to set at liberty all the prisoners confined on the criminal side of the jail ;—is the latter bound to do so. The bailiff like the jailer is only bound to obey lawful orders : the orders of the sheriff are not imperative upon the bailiff unless they are legal.]

There is no analogy between the jailer having charge of criminals, and the bailiff, who has charge of a mere civil debtor. The jailer is not the mere servant of the sheriff. But further, for aught that appears upon these pleadings, the order of the sheriff may have been perfectly legal: the debt and costs may have been deposited in his hands, or some other state of circumstances (with which the bailiff had no concern or knowledge) may have existed to justify or necessitate the release of the plaintiff: nothing appears to the contrary, and the sheriff's acts will not be presumed to be illegal. There is not even any statement that the execution is in continuance.

[*The Chief Justice.*—It is not necessary to repeat what is once alleged and not denied:—the justification covers the whole period of the alleged detention.]

But the replication excepts twelve days, and alleges that during that period an order to release was existing.

[*The Chief Justice.*—That order is shown by the rejoinder to have been unauthorised ; and the facts are necessarily admitted by the demurrer.]

The facts, but not the inferences. Besides, the plaintiff's argument is, that, whether authorised or unauthorised, the bailiff has no power or right to question the correctness of that authority. The bailiff justifies under the warrant, which is the original command to him from the sheriff; the replication states what in effect amounts to a revocation of that warrant, and determines his power to act thereunder, for the warrant is stated in the pleading to have been revoked under the handwriting of the sheriff, by which act the bailiff became *functus officio*. The writ alone would be no justification. No one can act under the writ, without a warrant as well: the revocation of the warrant puts the bailiff in the same position as if he had never been appointed; the sheriff has a right to exercise certain powers over his servants: he would be entitled to dismiss his servant, and transfer the custody to the hands of another. If it were not so, the bailiff might at his discretion act in defiance of his superior's orders, and subject the latter to the consequences of his misconduct.

[*The Chief Justice*.—The sheriff is a ministerial officer and may appoint a deputy; he is liable for a breach of duty by the deputy, but would clearly have a remedy over against the latter.]

If the bailiff had obeyed the orders given him, no action could have been maintained against him; the sheriff alone would be responsible, for the doctrine of respondeat superior would in such a case apply. This is a test, showing that the bailiff has no discretion to enquire into the legality of his superior's conduct, as that superior is alone liable. The consequence of holding otherwise would lead to the result, that the sheriff must always satisfy his own bailiff that the debt has been actually discharged. There is a manifest inconsistency in holding that the superior is always liable, yet that the inferior is not necessarily bound to obey him. In practice it is very

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usual for the sheriff, on being secured to his own satisfaction, to release the debtor. He may make himself liable for an escape; but what has the bailiff to do with that? He cannot be sued for an escape in any case.

[*The Chief Justice.*—Is that so clear?]

The authorities seem to establish it. (a) At all events the bailiff could not be sued for an escape, where he acted strictly, in pursuance of the orders received from the sheriff or his deputy.

[*The Chief Justice.*—The sheriff's authority is derived from the Court. The officer is connected with him through the warrant, and takes possession, not by virtue of any power inherent in the sheriff to order him to do a thing, but because he takes a derivative power from the Court. Assuming no action would even lie against the bailiff, still that would not govern this case, for if the party is in legal custody the bailiff is justified in detaining him, as he is doing only what the Court virtually directs.]

Suppose the sheriff had revoked the warrant to the defendant and appointed another bailiff to keep the plaintiff in custody:—that would have been perfectly legal.

[*The Chief Justice.*—That is not what is replied here.]

Both replication and rejoinder are consistent with that state of facts. Such order would be an order to “release” *quoad* the defendant's custody of plaintiff, the demurrer only admits the facts pleaded, not the inference that the order was unlawful.

Mr. Sandes and Mr. Taylor contra. The argument on the other side is based altogether on the assumption that the bailiff is bound, blindly and implicitly, and without the slightest regard to possible consequences to himself

(a) *Atkinson* on sheriff law 364. *Brown v. Compton* 8 T. R. 424, *Watson* on sheriff law, 140-144. *Dalt. sheriff. Vin. Ubr. Esc.*

from compliance therewith, to obey every order of the sheriff, whether legal or illegal; the argument is even carried to the extent, that the bailiff is bound to obey, although he may be aware at the time, that his principal's orders are illegal: surely that is not the law.

It has been argued that non constat the debt and costs have been paid, or that some change of circumstances has occurred, of which the bailiff was ignorant. This may be answered in several ways. In the first place, it would be rather hard upon the defendant, if such material facts as these, essentially affecting the very cause of action, are to be taken for granted against him, because the plaintiff has neglected to state them himself. Secondly, it was the plaintiff's duty to set the facts out upon record, the question having been pointedly raised by the defendant. Thirdly, if the presumption is to be founded on the probabilities of the case,—the presumption would rather be, that, in the *absence* of any allegation to that effect, no change of circumstances had actually occurred:—and lastly, there is an express averment in the rejoinder “that the debt and costs are still due.”

The real question raised is, whether the sheriff can, *ex mero motu*, and without proper authority, compel his bailiff to discharge a prisoner for debt out of custody.

The writ to the sheriff, and the warrant to the bailiff are of equal power, inasmuch as they emanate from the same source, *scil.* the Court:—any legal custody thereunder, continues so, until legally determined. Here the imprisonment was lawful in its inception; it continued so until an order to liberate was given by the sheriff to the bailiff;—that order, however, is admitted to have issued without authority:—it follows then, as a necessary conclusion, that the order being inoperative, no cause of action, constituting a *false* imprisonment, could possibly have arisen in consequence of the subsequent detention.

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In contemplation of law, the sheriff and the bailiff are identical, and the act of one is considered the act of the other. Suppose the former to be the responsible party, what would his misfeazance or nonfeazance (for the consequences of which the plaintiff is suing) in this instance amount to? Simply to this: that the sheriff, having in fact no authority to that effect, *contemplated* merely a liberation of the plaintiff, without, however, subsequently carrying that purpose into execution. Can this be tortured into a false imprisonment, or an action be sustained against the sheriff on such a ground? Clearly not:—and yet it is now sought to charge the bailiff for not acting in accordance with an inoperative order of the sheriff, revocable at his pleasure or caprice, and amounting in reality to nothing more than an act of volition on the part of the latter. It is on principles of public policy that a sheriff is liable civilly for the tortious act, default, or other misconduct, whether wilful or inadvertent, of his under sheriff or bailiff, committed in the course of the execution of his duties; (a) and, in general, an action for the breach of a duty in execution of the office of sheriff, must be brought against the high sheriff, although the under sheriff or the bailiff is the party actually in default. It may be admitted, then, that the under sheriff or bailiff cannot in general be sued; but there are some instances of misfeazance and malfeazance in which the latter may be liable to the party aggrieved; as if he voluntarily permit an escape, or is guilty of any act of trespass in executing process; for in such cases the officer becomes an active personal wrong doer. The bailiff here would clearly have been guilty of a voluntary escape, had he allowed the plaintiff to go at large, in obedience to an order from the sheriff, which he knew at the time to be

(a) Vide 2 T. R. 151; 2 T. R. *Sturmy v. Smith*, 11 East, 25. & 712; 7 T. R. 267; Doug. 40. *Crowder v. Long*, 8 B. & C. 620.

illegal and unauthorised. No doubt the sheriff has certain powers over his servants, but those powers must be exercised strictly within the confines of the authority entrusted to himself. He cannot compel the bailiff (either within or without the pale of the duties of his office) to commit a *tort*, so as to make the latter liable in invitum. It has been decided that an agent or servant, though acting bona fide under the directions, and for the benefit of his employer, is personally liable to third persons for any tort or trespass he may commit, even in the execution of the orders he has received. *Stephens v. Elwall (a) Cranch v. White (b)* and if the master has not the right or power to act himself, he cannot delegate an authority to the servant, so as to protect the latter from responsibility. Now the sheriff in this instance, not having proper authority, clearly could not himself liberate, and therefore could not *direct* a liberation: consequently *he* is not liable in this form of action; how then can the bailiff be charged? In order to render a public officer responsible for breach of duty, that duty must be such as he is bound to perform. Here it certainly was not obligatory on either the sheriff or his officer to release the debtor, for it is nowhere stated that the Court or the execution creditor had issued commands to that effect, in consequence of the debt, &c. having been paid, or by reason of any other change of circumstances unknown to the bailiff.

If the plaintiff had been released, it would have amounted to an escape, for which the sheriff would have been responsible: but the bailiff would have been equally so, for to an action in that form, it would be no answer for the bailiff to say that he had acted upon an erroneous supposition of the validity of the order from the sheriff. It is therefore consonant with reason and justice that the bailiff should, (when he has reason to doubt) have a right

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BEHARRIRAM
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LYON.

(a) 4 M. & S. 259.

(b) 1 B. N. C. 418.

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to question the correctness of the command, which alone can constitute his protection in the event of mistake.

Lastly the replication is bad on general demurrer. The gist of the answer to the plea of justification is, that the defendant's powers were at an end by virtue of a valid order to discharge from the sheriff. The words are "the sheriff in writing under his hand *duly* directed and commanded the defendant as such bailiff to release." The use of the word *duly* is clearly insufficient. It may refer to the form of the order, which might have been correct and stringent enough, and yet not have flowed from the proper source, *scil.* from the plaintiff himself, or from the Court. If ought to have been stated, how and whence that authority was derived; for the question being one of mixed law and fact, the Court ought to be enabled to judge on the pleadings whether the authority was legally sufficient.

SIR L. PEEL, C. J.—This is an action for false imprisonment: and in order to support the proposition contended for on behalf of the plaintiff, we must go the length of deciding, that the result of disobedience by a bailiff to an unauthorised order from the sheriff, commanding him to release a person in custody, constitutes, as between the bailiff and that third party, a false imprisonment. On these pleadings it must be taken as true that the plaintiff was arrested under this writ of *capias*, and that he was detained thereunder during the whole time alleged in the plaint. It has been contended that during a portion of that time the imprisonment was wrongful, because the bailiff detained the plaintiff after a command from the sheriff to release him. It is to be observed, in the replication it is not stated that any legal order was given to the sheriff empowering him to release, but it is averred in these words "the sheriff in writing under his hand *duly* directed and commanded the defendant as such bailiff to release." The words "*duly*

directed" are very insufficiently pleaded, and throw no light whatever upon the subject. The law on this point is clearly laid down in *Rutter v. Chapman*. (a) The rejoinder states that at the time of giving the command to release, the monies were unsatisfied, and further "that they are still due and unsatisfied," and as the whole imprisonment is justified, if there was no satisfaction made of the debt and costs, the inference is that no legal order was given to the sheriff; as to whether the order to the bailiff was a proper one, that is left a total blank. If the sheriff acted under authority to release, derived expressly from the Court, or the execution creditor, that would operate as an answer. The sheriff is clearly a ministerial officer, and can only walk in the path assigned to him, and the act of the bailiff is the act of the sheriff. Any liberation under the circumstances would have amounted to an escape. We cannot hold that where a bailiff has received an erroneous order to release from the sheriff, and declines to act until he has communicated with his principal, the intermediate time constitutes a false imprisonment. We should be investing the sheriff in such a case with power not belonging to him. As to the argument of revocation of authority, that is not reconcileable with the facts.

Demurrer overruled.

(a) 8 M. & W. 1.

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BEHARRIRAM
v.
LYON.

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Nov. 15.

Monday.

In Equity.

MUTTY LOLL SEAL

vs.

BYCAUNTNATH MULLICK and others.

*Practice—Mode
of compelling
payment of taxed
costs upon change
of Attorney.*

Upon demand and refusal to pay taxed costs, an order for payment will be granted, upon affidavit of the demand and refusal, and service of notice of Motion; upon service of that order and further demand and refusal an order for attachment will be granted, without notice, upon production to the registrar of an affidavit of service of the last mentioned order, and of the further demand and refusal.

MOTION for an order “that the defendant Bycaunt-nath do within four days after service on him of the order moved for pay to his late attorneys the amount of the bill of costs allowed by the taxing officer against him in the above cause together with the costs of the application, and that in default thereof he stand committed to the custody of the sheriff of Calcutta.”

The application was made on behalf of Bycaunt-nath's former attorney in the suit. The change of attorneys was effected on the 21st of September—the allocatur of the taxing officer was served personally on Bycaunt-nath on the 7th of October, and demand of payment made. On the 12th a notice had been served on his present attorneys, to the effect, that, in default of payment of their bill of costs (thereto annexed) before the following Monday (the 15th) the present application for an attachment would be made.

Mr. *Clarke* in support of the motion—observed that the only doubt as to granting the application was with reference to the mode of practice to be adopted in such cases; viz. whether it was necessary for the attorney *before* applying for the present order, to obtain an *order* fixing a day for payment of the costs. He cited *Stocken v. Dawson (a)* in which case a similar question was referred to one of the Registrars, who returned the following certificate.

“The solicitor must first demand payment of the money found due from his client; and, if it is refused, then he must apply to the Court for the four-day order,

(a) 7 Sim. 547.

which will be granted on producing an affidavit of the demand and refusal, and of the service of the notice of motion. The four-day order is then served upon the client, and demand again made, and, upon refusal, an order for commitment is granted, without notice, but an affidavit of service of the four-day order and of the demand and refusal is produced to the Registrar."

PER CURIAM. The practice ought to be settled. You may therefore take a rule.

Order granted.

Plea Side.

Doe on the demise of **BISSONATH DAY**

vs.

EDWARD HILDER.

1847.

In Equity.

MUTTY LOLL
SEAL
v.
BYCAUNTNATH
MULLICK.

Nov. 15.
Monday.

Judgment against
casual ejector—
Costs.—Landlord
and Tenant.

MOTION, on petition, that the judgment entered by default be set aside, and the petitioner, Abdool Ruhim, have leave to enter into the common rule, to defend his title to the premises in question, as landlord.

Mr. *Morton* supported the motion.

Mr. *Clarke* and Mr. *Ritchie* showed cause.

The petitioner's affidavit stated that he was a Moulavee of the Mohammedan College, and the proprietor of the premises. Mr. Lemaistre, of the Englishman news-paper office, had become his tenant about two years ago, and wished to purchase the property for the sum of Co.'s Rs. 7,000: that the offer was not considered sufficient, and that, in consequence of his disappointment, Mr. Lemaistre had preferred a charge of forgery against the petitioner, in order to frighten him and extort his consent to a sale, which charge was suppressed by the Magistrate before whom it was brought. That the name of the lessor of the plaintiff was fictitiously used, Mr. Lemaistre being the party really interested.

In this form of action the Court will usually (even after considerable delay) let in a party to take defence, unless gross laches are shewn.

One L. believing his landlord's title defective, purchased the lands whereof he was tenant, before the expiration of his lease, from another party, in whom he alleged the real title to exist; taking the conveyance and bringing ejectment in the name of the lessor of the plaintiff. Judgment being subsequently signed by default; the present motion was made by the landlord for leave to enter into the common rule, and as such to defend his title.

Held under the circumstances that (contrary to the ordinary rule) the judgment must be set aside without Costs.

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BISSONATH DAY.
v.
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The petitioner's delay in entering into the common rule was alleged to have been caused by his being deprived for a long time of a portion of his title deeds by Mr. Lemaistre, to whom he had entrusted them for the purpose of inspection: and that he had only regained possession of the document on the 25th of August last.

The affidavits in opposition stated,—that the petitioner himself had been anxious to sell, but constantly evaded producing his title deeds; on obtaining possession of which, Mr. Lemaistre submitted them to his attorneys, who, on inspection, discovered that the deed purporting to convey the estate to the petitioner, bore the name of an attorney as witness thereto, when no such name was on the roll of attorneys at the time. The deed in consequence, being suspected to be forged, the offer to purchase was declined. The deeds were all returned, with the exception of the suspected one, which Mr. Lemaistre declined to return, save through the intervention of a Magistrate. It having been subsequently ascertained that one Meer Muddoo was the rightful proprietor, Mr. Lemaistre concluded an agreement with him for the purchase of the property. The conveyance was taken in the name of Bissonath Day, in consequence of the anticipated legal difficulty in an action of ejectment, Mr. Lemaistre having originally entered into possession of the premises, under the petitioner. The charge before the Magistrate was preferred for the sake of justice: it was not entertained, on account of the petitioner's attorney having objected, that great delay had taken place in preferring the charge, and that a civil suit was pending in respect of the property.

SIR L. PEEL, C. J.—In this case the petitioner stands in the relation of landlord to Mr. Lemaistre. It is not a case of expiration of the lease by effluxion of time or otherwise, but where another title is set up; in which case the rule is peremptory, that the tenant must give up possession to the landlord of whom he is seized. Here

the lessor of the plaintiff is a purchaser in trust for the tenant, Mr. Lemaistre. This being a fictitious form of action, the Court is constantly in the habit of letting in parties even after execution. This is not such an omission, nor are there such laches, as will induce the Court to reverse the position in which the parties are entitled to stand.

Mr. *Morton* asked for the costs of the ineffectual opposition.

Mr. *Clarke* observed that the statements and charges against Mr. Lemaistre, in the petitioner's affidavit, were of such a nature as rendered it absolutely necessary for the latter to file an affidavit in denial of those charges, in order to disclose the real state of the case.

The Court said they would look into the affidavits and consider the question of costs.

SIR L. PEEL, C. J. now delivered the judgment of the Court, upon the point reserved.

We are of opinion that the judgment against the casual ejector should be set aside, without costs: in an ordinary case it should be on the terms of payment of costs; but there has been in this case, a misuse of the process of ejectment, which we are willing to attribute to mistake, and not to intention. Mr. Lemaistre was the tenant in possession, and the party applying to defend, was his landlord, from whom he received possession of the premises as tenant. The law does not permit a tenant to dispute the title of the party, from whom he has received possession of the lands, though he may show that the landlord's title has expired. Here, the tenant entered into a negotiation to purchase the lands from the landlord, which was broken off. He was not satisfied with the title, and, imputes, that the deed conveying the property to the landlord is a forgery. The tenant then purchased the lands from another party, in whom he states the real title to be; and, being advised that there would

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be difficulties in bringing an ejectment in his own name, he took a conveyance in the name of the lessor of the plaintiff. But these facts ought to have been disclosed on the affidavit of title, and if the Court had known that the lessor of the plaintiff was substantially identified in interest with the tenant in possession, they would never have permitted the judgment to be signed; for such a proceeding is completely at variance with the principles, on which the rule that a tenant is not permitted to dispute a landlord's title, is founded: principles, which are not technical, but established on the plainest grounds of convenience and justice. It never can be permitted that a tenant should buy up an adverse title during his tenancy, and defend his possession in fact against his landlord, on a new title. The possession must be restored to the landlord: and then, and not till then, is the tenant in a position to proceed adversely in the character of purchaser of another title against his landlord. The latter *may* treat his tenants' disclaimer as a forfeiture, but he is not bound to do so. He may prefer to treat the lease as continuing, if it have not been legally determined; and to claim rent from the tenant, whilst his possession lasts under the lease, which it will be considered as doing, though an adverse title be, in fact, acquired by the tenant. The effect of allowing this judgment to stand, would be to let the tenant turn his own landlord out of possession, so as to put the latter under the necessity of bringing an ejectment. The law protects possession: that of the tenant is identified with that of the landlord, from whom he received it, and it would be wild work indeed, if we permitted a tenant, discovering a flaw in his landlord's title, to turn him out of possession, by setting up his (the tenant's) own possession as adverse; and, as adverse to himself, for the tenant as *cestui que trust* of the lessor of the plaintiff, would be treating himself (the tenant) as adverse to himself, in order to change the possession against his own landlord.

Rule absolute, without costs.

Plea Side.

NURSINGCHUNDER BOSE

vs.

PANCHCOWRIE DAY CHOWDRY.

1847.

Nov. 15.

Monday.

ASSUMPSIT by the third indorsee of a Promissory note for Rs. 4,043, payable six months after date, against the representative of the maker, one Gungadhur Day Chowdry, who after making thereof, delivered the same to one Juggetchunder Bonnerjee, who endorsed to Govindchunder Bonnerjee, who endorsed to the Plaintiff.

Second plea.—That G. D. Chowdry in his life time made the said note for the accommodation of the said Juggetchunder, and that there never was any consideration or value for the making of the note, or for the payment by the said G. D. Chowdry of any part of the amount thereof. Further—that there never was any consideration for the endorsement of the note by Juggetchunder to Govindchunder. That the note remained and was outstanding in the hands of Govindchunder until at and after the time when the same became due and payable, and without any authority or permission from G. D. Chowdry to negotiate the said note, after the same became due or payable. Further—that after the promissory note so became due and payable, Govindchunder endorsed and delivered the note to the Plaintiff. Verification.

Third plea.—That the note was in fact made for the accommodation and benefit of Govindchunder, the first indorsee, as in the plaint mentioned, and upon the understanding and agreement thereafter mentioned. That G. D. Chowdry did not receive any value or consideration for making the said note, but that before and at the time of making thereof, there had been and were divers accounts between the said G. D. Chowdry and the said

*Prom : note—
pleading.*

Assumpsit by the third indorsee of a Prom : note.

2d Plea : that the note was made for the accommodation of the first indorsee, and without consideration for the making, or payment thereof; or for the endorsement thereof by 1st to 2nd indorsee; that the note remained, (without authority from the drawer to negotiate it) outstanding in the hands of the second indorsee, who after due date endorsed to the plaintiff—*Held bad.*

3rd Plea — That the note was an accommodation note, and given without consideration, and subject to an agreement to the effect—that certain unadjusted accounts between the original parties to the note should be adjusted prior to its reaching maturity: that if the balance proved in favor of the drawer, the note should not be enforced against him by any one: that the balance did turn in his favor; but the note was endorsed fraudulently to the Plff. after due date—*Held good.*

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Govindchunder; that such accounts were open and unsettled, and it had not been ascertained whether or not the balance of the said accounts was in favor of Govindchunder or G. D. Chowdry. Further—that at the time of making the note, it was agreed between Govindchunder and Juggetchunder and G. D. Chowdry that the accounts should be investigated by G. D. Chowdry and Govindchunder, and an account stated between them respecting the same at a future time, to wit, before the note should become due and payable according to the tenor and effect thereof, and that, in the event of its appearing, upon such settlement of accounts, that G. D. Chowdry was not indebted to Govindchunder, in any sum as the balance thereof, that G. D. Chowdry should not be called on by Juggetchunder, or Govindchunder, or by any other person, to pay the amount of the note, or any portion thereof. That G. D. Chowdry then made, and Govindchunder received the note upon the terms aforesaid, and for no other consideration. That afterwards, and before the note became due, G. D. Chowdry, in his life time, and Govindchunder investigated the accounts, and it then appeared that the former was not indebted to the latter in any sum of money. Further—that at the time the note became due it remained outstanding in the hands of Govindchunder, and that he, in fraud of and without the consent of G. D. Chowdry, endorsed it after it became due to the Plaintiff. Verification.

Demurrer to the second plea—assigning for cause, in substance, as follows: that the said second plea constituted no defence to the action: that, by admitting the endorsement to the plaintiff to have been for full value and consideration the plaintiff's primâ facie right to sue was also admitted, which right (in the absence of any agreement to restrict the negotiability of the note; or of any allegation of fraud; or without notice of any prior subsisting equities,) could not be changed or defeated, by the

mere fact of the plaintiff's having taken the bill when overdue, or by the fact simply of the note being an accommodation note, or on the ground of want of consideration, for the antecedent endorsements or for the making and payment thereof respectively by the drawer: or even, by reason of the existence of all those facts collectively.

Demurrer to third plea:—in substance as follows. That the plea disclosed no defence to the action; for whatever defence the facts stated might afford as between the parties to the agreement, still enough was not disclosed to defeat a bona fide holder for value. That the agreement stated, did not restrain the negotiation of the note, but amounted to a mere promise or undertaking by the payee and first indorsee to indemnify and save harmless (and no more) the drawer, upon certain contingent events: that the third plea stated the note at the time of making thereof to have been an accommodation note, and given without consideration, subject to certain events; and also that at the time of its becoming due and payable and remaining in the hands of Govindchunder, it was at the utmost only an accommodation note, and outstanding, either without consideration at all, or with a consideration which had failed: if the latter it should have been so pleaded:—but in either case the drawer, by not calling in the note, became a trustee or surety for payment thereof to subsequent bona fide holders:—that the plea was bad, inasmuch as it set up a parol cotemporaneous agreement inconsistent with the contract declared on, and sought to vary, not merely the consideration, but also the mode of payment; for the contract declared on was upon a promissory note, (an instrument payable at all events) and the agreement in the plea in its terms set up as defence that the note was payable only on a *contingency*:—also, that although a bill or note was payable when it became due, according to the effect thereof, yet the plea attempted to show that it was virtually discharged before it became due:—that the said third plea was repugnant and inconsistent, inasmuch as,

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although it alleged that the note was for the accommodation of Govindchunder, and also that there was no consideration for the making thereof, yet it proceeded to set up mutual existing accounts and debts between Govindchunder and the drawer, of an unascertained amount, in respect whereof each party might have sued the other; therefore the note (which was a security at all events) was shown to have been given originally for good and valid consideration, whereby a right to sue was conferred, and a liability contracted by the parties thereto. And also that the third plea was repugnant and inconsistent, in that it alleged that the note was made for the accommodation of Govindchunder, and without any consideration, and that Juggetchunder received the same upon the terms in the third plea stated, and yet it was admitted that Govindchunder gave value for the indorsement to him by Juggetchunder:—that the statements as to the agreement in the third plea mentioned amounted to surplusage, and tended to prolixity of pleading, inasmuch as if it were true that the note was merely an accommodation note and given without any consideration at all, such agreement (as between the parties to the note) would be implied by law, and need not therefore be stated, and as to strangers would be inoperative. And also that the third plea was argumentative, and amounted to mere matter of evidence, for the purpose of showing that the note, at the time it became due and payable, was simply an accommodation note.

Mr. *Taylor* in support of the demurrers, cited, as to the first—*Charles v. Marsden (a)*, *Stein v. Yglesias (b)*, and *Sturtevant v. Ford (c)*; and as to the second demurrer—referred to the several judgments of Mr. Baron Parke in the cases of *Edwardes v. Jones (d)*, and *Baker v. Walker (e)*.

(a) 1 Taun. 224.

(c) 11 L. J. 246. C. P.

(b) 1 C. M. & R. 565.

(d) 2 M. & W. 414.

(e) 14 L. J. Ex: 371.

Mr. *Montriau* in support of the 2nd plea cited *Sturtevant v. Ford* (a) and referred to a precedent in the last edition of *Chitty Junr.* on pleading (b) as very little varying from the plea in the principal case.

As to the 3rd plea, *Thompson v. Clubley* (c), *Richards v. Macey* (d), *Cripps v. Davis* (e) were cited.

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SIR L. PEEL, C. J.—The case is not free from doubt on the sufficiency of the first plea demurred to, but we think the demurrer to that plea must be allowed. It appears to us to set up that the note was an accommodation note, endorsed to the Plaintiff after it became due, with an additional and important averment, that it remained after it became due in the hands of his endorser, without permission of or authority from the accommodator then to transfer it. Mr. *Montriau* referred us to a plea as a precedent, contained in the last edition of *Chitty Junr.* on Pleading: but the precedent is more full, and contains an averment, which is wanting in this plea, viz: “that it so remained without the laches or negligence of the accommodator.” This we think an important omission in the plea. The negotiability of an accommodation note after it became due, would not be restrained, except by agreement that it should be so restrained. The averment in this plea may be viewed as an informal statement of that agreement. That is the utmost effect we can give to it; still, if the accommodator allowed it to remain out in the hands of the holder, when he might resume it, or cause it to be destroyed, we think he would thereby put an endorsee for value, *bonâ fide* and without notice of its restrained negotiability, taking it, though over-due, in a condition to recover from him; we cannot view this plea, therefore, as stating *all the facts*, which might restrain the negotiabi-

(a) 4 M. & Gr. 101.

(c) 1 M. & W. 212.

(b) vol. 2, 276, by Pearson & Chitty. (d) 14 M. & W. 484.

(e) 12 M. & W. 159.

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lity of such a note against such an indorsee, as the present Plaintiff must, on these pleadings, be taken to be. It appears to us, therefore, that neither the precedent referred to, nor principles support this plea.

The demurrer to the other plea cannot, we think, be supported. There is certainly some confusion in the language of its commencement, but we think that it does not set up an accommodation note, for the statement of the concurrent agreement is inconsistent with the notion of the note being an accommodation note. The plea is therefore, in substance this; "that the note was given as a security for an unascertained balance, with an agreement that if the balance on the accounts of certain concluded transactions proved, within the immaturity of the note, to be in favor of the party primarily liable, then, it should not be enforced; that the balance so turned, and that *after the note became due*, it was endorsed to the Plaintiff. It was urged for the Plaintiff that his endorsee had given value for the note; but the latter was party to the agreement, and therefore cognizant of its terms. And if he chose to give value for it without taking any pains to ascertain how the balance turned, we think he cannot be in a better position than a holder, taking with express notice of the result, or a holder not for value. The Plaintiff cannot protect himself under that title: the endorsement to him is after the bill became due, and he therefore took it with the equities attaching to it. We think, it was not necessary to allege notice in the plea; if notice were at all important in such a case, it would be a legal result from the facts, and it is not necessary to state legal results in pleading. If notice, on the argument meant knowledge, clearly the law does not require it.

Demurrer to 1st plea allowed—to
2nd overruled—with leave, to De-
fendant to amend 1st plea—and
to Plaintiff to reply to 2nd.

*Admiralty Side.*In re Barque **ATHOLE.**

1847.

Nov. 16.

Tuesday.

SUIT for Salvage and extra Pilotage.

The affidavit of the promovents, Alfred Park Sandeman, and Thomas Andrew Boyce, disclosed the following facts.—On the 12th of September 1847, Sandeman and Boyce were on board the pilot brig ‘Fame’ near the Sandheads, off the mouth of the river Hooghly, when a vessel, which proved to be the English barque ‘Athole,’ of the port of Liverpool, of the burthen of 337 tons, or thereabouts, bound to Calcutta, laden with a cargo of salt and bottles, signaled the pilot brig ‘Fame,’ for a pilot, and Sandeman, (who was the pilot on board of her,) and Boyce, (the leadsman,) together with one Christopher, (a servant,) about 2 o’clock on the 12th reached the ‘Athole,’ for the purpose of piloting her to Calcutta. On getting on board, the captain informed Sandeman, (as was the fact,) that the crew were in a most debilitated condition, seven men only, (including himself and his officers,) being able to work at all, and that even the services of the latter could not be depended upon in an emergency, as they were completely exhausted with fatigue. The crew had suffered greatly from scurvy during the voyage; one having died at sea, and nine being then laid up, out of the 17 forming the full complement of the vessel, and it was quite impossible for the crew to work her or raise the anchor, without assistance.

The wind was moderate from the S. E. at the time, but there was a heavy swell, and the ‘Athole’ in a very dangerous position, as she could not have anchored there safely, (especially with a chain cable, which was the only description of cable on board,) inasmuch as, if the anchor had parted, there would not have been sufficient hands to navigate her, the ‘Fame’ having only sufficient hands to

Pilotage—what services beyond—remuneration for.

A pilot and his men, (who had been signaled on board a vessel for the purpose of piloting her up to Calcutta,) finding nearly the whole of the crew of the latter disabled from scurvy, assisted also, with the knowledge and assent of the Captain, in navigating the vessel, kept watch at night, and worked as seamen. — *Held* that the pilot and his men were entitled to remuneration, beyond that for mere pilotage.

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work herself; and if she had anchored, the only method of again getting under way would have been to slip the cable, by which the anchor, weighing 18 cwt. and the chain cable (about 75 or 80 fathoms in length,) of the aggregate value of Co.'s Rs. 1,000 (and which would be afterwards necessary for the safety of the ship in going up the river,) would have been wholly lost: her only chance of safety (and that a perilous one) was to run into Saugor at once. This course was, therefore, recommended by Sandeman to the captain, as the best, though a dangerous one. But as it was contrary to the regulations of the pilot service at Calcutta, to run up a ship at night without a written sanction from the master of the vessel, he (Sandeman) required Brown, the captain, to sign a letter or certificate in the following terms:—

“ Dear sir,

“ I will feel obliged by your doing your utmost to get my vessel into safety, and if you can with prudence run into Saugor during the night I will thank you to do so. The ship is now in a dangerous state, being left with only a few men, and unless we reach safe anchorage the consequences may be very serious.

“ Yours obediently,

“ To Mr. A. P. Sandeman.” (Sd.) “ A. Brown.”

On obtaining this letter, Sandeman proceeded at once to pilot the ‘ Athole ’ up the river. About 20 hours afterwards, and when the ship was just above Kedgere, the wind having changed to the N. E. it came on to blow hard, and the weather continued very squally. During this time, such of the crew as were not utterly unable to work, were in a complete state of insubordination, and refused to lend any assistance, or obey the master's orders. Sandeman and Boyce were, therefore, obliged to work as common seamen, assisted by the chief mate of the

'Athole;' and, navigating her though a very dangerous channel, (where she was in imminent danger of becoming a wreck) a little after 12 o'clock P. M. reached Saugor Roads, and there, with the help of only three of the crew, let go the anchor of 18 cwt. and clewed up the sails, Sandeman and Boyce themselves keeping watch during the night. Early the next morning (having engaged the assistance of the men belonging to two fishing boats) they weighed anchor, and beat up 15 miles above Kedgerree, and anchored, when it came on to blow heavy squalls. The crew refused to obey orders—great quarrelling between them and the master ensued, and the promovents, assisted by the chief mate, carpenter, one of the crew, and the cabin boy, were obliged (with such insufficient means) to furl the sails, and to keep watch again during the following night. On the 14th the 'Athole' was taken in tow by the Frances Gordon, Steam Tug, (with the consent of her commander, who, under the circumstances, permitted that course, although engaged to tow up another vessel called the 'Bloreng,') and the 'Athole' arrived safely at Calcutta on the same day.

The promovents in the first instance claimed Rs. 5,000, being a tenth of the value, but subsequently demanded Rs. 300. An offer of Rs. 150 for Sandeman, and Rs. 50 for Boyce was then made and refused, the latter alleging that the 'Athole' was of the value of Rs. 60,000, and her cargo Rs. 10,000, or that she was insured to that amount. It was admitted, however, that she was of the value of Rs. 50,000.

The evidence disclosed in the affidavit of Archibald Alexander and William Morris (amongst other matter) was to the following effect.—The former was second mate, and the latter, a seaman on board the barque 'Athole', which sailed from Liverpool on the 2nd of May, 1847, with a crew of 17 men, including the captain and officers, and arrived at the Sandheads, at the mouth of the river Hooghly, on the

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12th of September following. The Steward died on board in the course of the voyage, and when the barque was rounding the Cape of Good Hope, the scurvy broke out among the crew, owing to their being fed upon salt provisions only, and the supply of lime juice being bad and unfit for use. From the period of leaving Ceylon, the crew more or less became unfit for work, and when the vessel arrived at the Sandheads, all (except the captain; one man, since dead; the cabin boy, and Archibald Alexander,) were sick and unable to leave their cots, and none were fit for hard work, except Alexander, and the cabin boy. The vessel was consequently in great distress, and the crew utterly unable to work her up the river, (the captain, the first mate, the carpenter, two men, and a boy, being at that time the only portion of the crew who could work, or even assist in working.) At the Sandheads, Alexander and the carpenter were taken ill, and disabled, so that the navigation and management of the 'Athole' was chiefly conducted by the promovents, who worked as common seamen. The affidavit of Alexander and of Morris also corroborated that of the promovents in most other respects.

The opposing affidavits contained evidence, admitting the services of the promovents to have been valuable, but depreciated the extent of those services, and denied that the weather was so bad as represented by the latter. It was admitted, that it was necessary to furl the sails in consequence of a squall coming on; and that the promovents had aided in the work; but, it was alleged, they had done so voluntarily. There was other evidence, however, of the promovents having been seen by persons on board the 'Emperor of China' (passing by at the time,) hauling in and fastening the tow lines, and taking part like common seamen, in working the vessel.

Mr. Colville (Adv. G.) and Mr. Ritchie for the pro-

movents: contended, that the services rendered by the promovents did not come within the scope of the ordinary duties of a pilot, for the vessel was in imminent danger, so that extraordinary risk had been incurred and extraordinary exertion and services were necessary to meet and avert that risk; and inasmuch as those services were actually rendered at a time when, but for the assistance afforded, the ship might have become a total loss, the promovents were entitled to remuneration beyond the scale of mere pilotage. *The Pyeen Boun (a), General Palmer (b), Isabella (c), Raikes v. Gardiner (d).*

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Mr. *Cochrane* and Mr. *Morton* for the impugnants urged—that the ‘Athole’ in reality never was in actual danger, but only in apprehension of it, and that only in the event of bad weather coming on. However meritorious the conduct of the promovents might have been in affording the assistance they did, still the services rendered were gratuitous and voluntary merely, possessing none of the ingredients constituting salvage:—such services therefore could give them a claim to remuneration for work and labor only. *The Clifton (e).*

If this claim were allowed, every pilot voluntarily coming forward to assist in any case of difficulty, would have it in his power to construe his services as entitling him to reward for salvage, or for extra pilotage, and demand a proportionate reward.

SIR L. PEEL, C. J. delivered judgment. The arguments which have been addressed to us, on the inconvenience which may result from our decision in favor of the promovents, would not weigh with us, even were they

(a) *Morton's Dec.* 42.

(c) 3 Hagg. 377. 2 Rob. 241.

(b) 2 Hagg. 176. 2 Rob. 806.

(d) 1 Hagg. 246.

(e) 3 Hagg. 120.

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well founded. A court of justice must found its decisions on its sense of the claim being well founded in law, and cannot dispense with the law in favor of what it may deem expedient. If such arguments could have weight, it is by no means clear, that they might not be met by arguments, which would bring the question of inconvenience to a state of equipoise; for it might be extremely inconvenient to commerce, if pilots, as well as other officers, were to render no services, except those which they were legally bound to perform. It has not, we believe, been found that any inconveniences have resulted from the decisions of the English Courts of Admiralty, entitling a pilot to remuneration for services not claimable from him in the character of pilot, and in the nature of salvage services. It is not necessary for us to decide whether the evidence establishes that the services rendered on the 12th, were salvage services. We should not be prepared to decide on this part of the case without a further examination of the evidence. We are clearly of opinion, however, that the services which the pilot rendered on the 13th, and which are not denied, were services not within the duty of a pilot; and it is not contended that they were, but it is urged that they must be considered as gratuitously rendered. There is not the least evidence to satisfy us, that it was ever understood between the pilot and the captain, that for all the laborious and meritorious services of the former, he was to receive nothing beyond a pilot's pay. If this had been communicated, and, with the knowledge of the fact, he had still rendered them, then there would have been weight in the observation that they were the works of mere benevolence. The services on the 13th in our opinion, furnish the ground of even a legal demand for remuneration; for valuable and effective services meritoriously rendered, such as it is not the duty of a pilot to render.* And the case on this point falls within the principle of the decision

in "*The Duke of Queensbury's* executors and *Tuller* his medical attendant." We consider the transaction as one continuing transaction, and that we are entitled to look to the whole of the pilot's conduct, from his first taking charge of the vessel, and that the meritorious conduct of that officer from the first must be considered by us, in estimating the remuneration to be awarded. The value of the property, the risk really incurred by him, his zeal and activity, and the acknowledged utility of his services are all to be considered. Mr. Cochrane has indeed contended, that the vessel was never in any danger whatever. That argument was founded in a great degree on facts not in evidence: the Court cannot take judicial notice of such facts, and we possess so very limited a knowledge of the localities that we are unable to say whether the facts are proveable exactly as asserted. On the evidence in the cause we think that the vessel was in very considerable risk (for we avoid the use of the ambiguous expression *danger*.) The captain's own statement at the time that there was danger, is strong evidence of the real state of facts inserted in such statement. It would have been so manifest a breach of his duty to sign that letter, if the facts had been untrue, that we cannot suppose he adopted blindly what Sandeman wrote, and suffered an apprehension of an unreal danger to be infused into his mind, at the mere suggestion of the other. The captain had, at least, as much knowledge as the pilot, of all that related to the condition of his own crew; of the risk attending his putting out again to sea, at that season, with such a crew; and of his remaining where he was without additional hands. It is admitted that he asked for more hands at the time the danger was stated by himself to be owing to his insufficient crew. If, in that state of things, he had actually, at his own request, on a representation of danger and of an insufficient crew, received hands from a pilot brig

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to navigate his own vessel up the river, it would have been very difficult to distinguish this case from that quoted by Mr. Cochrane, which was certainly not a case of graver risk, and which was considered a case of salvage. Had the evidence clearly shown that the services of the pilot and his assistant were, on the night of the 13th, of the same character as those of the 12th, the case would, in our opinion, have been governed by the one quoted. It has been argued that the pilot's services were merely the services of a mariner, for a short time enduring a little extra fatigue and a few extra sleepless hours. This however is not a correct appreciation of the services and of the risks really encountered. It is admitted, that the pilot stated at the time, that proceeding to Saugor that night would be attended with danger. It is admitted by the captain himself, that this was so stated, and there is no ground, in our judgment, to doubt the correctness of such statement. The captain merely denies that the danger was stated to be *great*. It would be difficult to establish that it is the bounden duty of a pilot in this service to undertake, for his mere pilot pay, received from government, the direction, in the night time, in a dangerous channel, the navigation of a ship, with a crew alleged by the captain, and believed by himself, to be insufficient. The loss of a ship under a pilot's management, is at all times a most serious matter to him: and even if the result clearly exonerate him in the opinion of all from blame; still, he has much of anxiety to endure from the very investigation itself into the case, and from his necessary dependence on the judgment of others. In addition to this, there has certainly some personal risk been incurred. On the whole, therefore, we have no hesitation in saying that we consider his services to have been very meritorious and valuable; that the risk was real; that his services conduced to avert it; that he did more than a pilot was

bound to do throughout; and that he is entitled to a fair, and even a liberal remuneration for the services rendered. He himself in claiming 300 rupees put a reasonable limit, we think, to his demand: when he consulted his legal advisers, they, probably not adverting to the cases illustrative of the appreciation of services of this nature, demanded an excessive remuneration; a rate, however, which, in certain cases of salvage, would not have been by any means excessive, viz. a tenth of the value: but it is to be observed, that they subsequently proposed that an offer should be made to them of 1,000 rupees, or a fiftieth. We consider this, even, would be an unreasonable sum to award. No sum has been tendered. The parties salvors, are in general extravagant appraisers of their own services; on the other hand, after the peril is over, the danger is often viewed microscopically, and gratitude abates proportionably. We consider the sum offered as a gratuity, not sufficient in amount. We shall make an addition to it, by giving the promovents what they originally asked; and which, under all the circumstances, we think reasonable, viz. 300 rupees, to be distributed thus: to Sandeman, 200 rupees; to his assistant 75; and to the third promovent 25. The costs must follow the result, no tender having been made in the suit.

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Wednesday.

SREE MUTTEE RANEE SURNOMOYE DOSSEE

*vs.**Will — What revocation of.*

THE EAST INDIA COMPANY, and others.

Rajah K. Roy made a will, which was duly executed and attested. He afterwards, by inserting marginal notes and otherwise in his own hand, considerably altered this will, and then gave it so altered to his attorney, for the purpose of drawing up a new will. When completed, the Rajah took possession of this last document: what was done with it by him, or what became of it, was never afterwards discovered. On the 31st Oct. 1844, the Rajah committed suicide. A will with two codicils was then set up: the former was stated to have been drawn by him on the day previous to his death, and the latter on the day of his death—The will only was attested and executed, viz. on the latter date. This last will differed in many material respects from any of the preceding. — Proceedings were instituted on the Equity and Ecclesiastical sides of the Supreme Court—issues at law were directed—and the Court found the last mentioned will and codicils “not proven.”

On further directions it was argued, that the first will stood revived. *Held*—that this depended on the testator’s *intention*, which was a question of fact; and as the evidence was altogether deficient in that respect, there was no ground for presuming, from the supposed destruction at an unknown time of the second will, an intention to revive the first, especially while there was proof of an execution *in fact* of a materially differing will.

THE Bill was filed by the only widow, heiress, and legal personal representative of the late Rajah Kristonauth Roy, Behadoor, a Hindoo Zemindar, deceased, against the East India Company, Charles George Strettell, and Kis-subchunder Sircar, and contained, amongst other matter, the following statements. The Rajah Kristonauth Roy was descended from Kristnocaunth Baboo (who in the year 1785, was in the service of Warren Hastings, Governor General of India, and amassed great wealth, and was the original sole acquirer of the large estates and property, subsequently inherited by his great grandson, Rajah Kristonauth Roy.) The latter was a minor at the time of his succession to the above property (which was of very great value, the realty being estimated at two crores of rupees, and the personalty at forty or fifty lacs) and during the period of his minority the estates were placed under the management of the Court of Wards. The Rajah Kristonauth Roy became of age in January, in the year 1841; in pursuance of verbal directions given by him, a will was drawn up by Mr. Strettell, his Attorney, and was duly executed by him, and attested by the subscribing witnesses, viz. Sir Thomas Turton (the then Registrar), W. C. Blaquiére (the then Chief Interpreter), and T. C. Morton, an Advocate of the Supreme Court. The Rajah at a subsequent period, made considerable alterations in the above will, by striking out several para-

graphs, and writing in his own hand on the margin, certain directions to the effect that particular provisions, and parts of the original will should be omitted. This instrument was ultimately consigned to Mr. Strettell's hands, for the purpose of framing a new will, in accordance with the alterations suggested. This Mr. Strettell did accordingly, and delivered the new will to Rajah Kristonauth Roy, by whom it was taken away, but without being executed. What became of it afterwards could not be discovered, but the original will, so altered, remained in Mr. Strettell's possession as a draft. It was to the following effect:—

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“I Sri Rajah Kristonauth Roy Bahadoor, Inhabitant of Cossim Bazaar, writing my estate, wealth, and the whole of my property that shall be in my enjoyment and possession at the time of my death touching whatever is necessary to be done herewith I am about to write in this my will.

Firstly.—I give as my command that in all my shrauds let not unnecessary and ostentatious expences be incurred. To prevent which I am at present by this will about to regulate the same: that after my death my first shraud shall be completed with Co.'s Rs. 6,000 and my annual celebration with Co.'s 4,000. Further I give as my command that this be not transferred in any way, and touching other shrauds and in the other daily and periodical acts I give as my command that all those shrauds or acts shall be effectuated agreeably to the custom of this family, but the same must be effectuated without useless show and parade.

And I give as my command that after I am dead, whatever estate or fixed wealth, zemindaries, lands, houses, and homesteads, gardens and orchards, tanks, et cetera, there may be belonging to me, the same shall be placed under the charge of the Court of Wards as long as my own or my adopted son which shall be alive at the time of my death shall not have attained his majority: (and the time of his attaining his majority I have now fixed to be eighteen years) and upon his attaining his majority after the aforesaid manner, I give as my command that the whole of my property and effects must be made over to my said son, or adopted son, as successor, subject to the command of the Court of Wards.

In the chief management of the business of my estate my friend William Stephen Lambrick must be appointed, subject to the super-

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intendency of my friend Charles George Strettell, an attorney of the Court of Calcutta; wherefore it will be incumbent upon him to effectuate every business with the advice and counsel of Strettell Sahib.

Further I give as my command that the whole of my Company's Papers, and securities, and obligations, and such like documents, from different persons, and my jewels and articles made of gold and silver, and all the articles and effects of the house, and dresses and wearing apparel, shall be kept in the room or apartment that shall be fixed upon by my wife and Mr. Lambrick, and Mr. Strettell Sahib, and all this property shall remain under their charge; but the whole of my Company's Papers and jewels and gold and silver articles and gems and pearls, and among my property whatever articles can be kept in iron or in the other chests, making an Inventory thereof and obtaining the signature of my wife and of the Executors on the said Inventory, all the said moveable property shall be kept in a chest made of iron or some other chest: the said chest shall have four keys, one of those keys shall remain in the hands of my wife, the second in the hand of Mr. Lambrick Sahib, the third in the hand of Mr. C. G. Strettell Sahib, or such among them as shall be forthcoming, and the fourth in the hand of the Collector Sahib of Moorshedabad for the time being: and the said chest shall be kept in a suitable room in my dwelling homestead in which the Collector Sahib of Moorshedabad shall direct the same to be placed upon due consideration at the time of my death, and the said chest shall be opened only in the presence of the persons and of a person on the part of my wife; and the said chest shall only be opened to take out the Company's Papers to get the interest thereof or to renew, that is to get new papers. Further I give my command that upon the interest of the papers being obtained they shall immediately be again put into the said iron chest in the presence of my Executors and the person appointed by my wife and the Collector Sahib.

Further I give my command that the interest of my Company's paper shall be drawn once in the year: the receipt for which two of my executors shall sign; if there be not two, in that case whoever shall be then forthcoming, he shall do so; and I give as my command that after deducting whatever shall be necessary to expend pursuant to the direction of this will whatever shall remain of the interest money, purchasing Company's Papers therewith, my executors and the Collector Sahib of Moorshedabad for the time being, shall endorse the said paper calling it the Company's Paper of my estate, and the said paper shall be kept along with the other papers in the chest abovementioned.

Further I give my command that upon my son or my adopted son

attaining his full age of eighteen years, all those Company's Papers and the whole of my immoveable and moveable shall be made over to him.

Further I give my command that my elephants, horses, dogs, guns, and watches, and musical instruments that I may have at the time of my death, shall not be sold or given away in alms, and all the amlahs or officers of my stables must be continued, and the food of my elephants, horses, dogs, and so forth, and the wages of the syces, and such like expences and disbursements, whatever shall be the estimate thereof at the time of my death, my executors continuing that, will defray the same, and will not lessen in any of the kinds except only upon death happening, when it can be lessened.

Further I give my command that the weight of protecting and looking after all these elephants, horses, dogs, et cetera shall be through the instrumentality of the persons mentioned below, viz. Dwarkanauth Chuckerbutty, Gungadhur Ghose, Joogoo Sing Jemadar and Shaik Hyder Coachman who are at present holding appointments in my service.

Further I give command that neither my executors nor any other persons have any concern with these persons; nobody shall be able to *intermeddle* with any matter of theirs, and my executors will in no way have any power or control over them nor of their dismissal from service; the whole of the weight of looking after and protecting my elephants, horses, and dogs, shall remain in the hands of these personally.

Further I give my command that if any of my executors intermeddle with the duties of any of those persons, or raise impediments, and if any of those shall make any complaint before the Collector of Moorshedabad for the time being touching such interference, the executors that shall have interfered whatever is receivable by them agreeably to my will and the weight of executorship that he had through this will, the whole of that shall cease.

Further I give my command that none of my executors or any other persons shall at any time be able to use in any way my elephants, horses, carriages, dogs, and the like; if any one uses them he will be liable to the aforementioned penalty: but the above mentioned Dwarkanauth Chuckerbutty, Gungadhur Ghose, Joogoo Sing Jemadar and Shaik Hyder coachman, only these persons shall possess the power of riding these animals and exercising them, and using my guns; but none of these persons shall be at liberty to go out of the compound with any of all those durbas. Further if any person among these shall give his consent to any other person to ride the aforementioned elephants or horses, or to use the dogs, guns, and the like, whatever shall be his hire shall forthwith cease.

Further, if at the time of my death I have an adopted son living, he will as my son become the successor of the whole of my fixed and

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moveable wealth, and upon his attaining the full age of eighteen years the Court of Wards and my executors will make over the whole to him, but such son shall not possess the power to use the elephants, horses, and the like.

Further I give my command that my son from my loins, or adopted son that shall have been received in my life time or after my death, shall be instructed in knowledge in the Hindoo College of Calcutta, in which seat of learning he will be obliged to remain till he attains the age of seventeen years, and besides the knowledge that he is taught in the said house of learning, I give my command that he shall be instructed in Bengali and Sanscrit and a little in the science of Medicine. Upon his attaining full seventeen years my command is that my friends Lambrick Sahib and Strettell Sahib shall instruct him in Royal duties.

Further I give my command that if one or more daughters shall have been born to me; in that event she or they shall remain with their own family; according to her or their rank receive suitable maintenance; and upon attaining their majority the expences and disbursements of her or their pilgrimages and for her or their marriages shall be defrayed like that for any sister and for myself: but if she or they remain in my family she or they will be entitled to receive the same; otherwise if she or they remove and go elsewhere from my family she or they shall be unable through this will of mine or from my estate to receive any thing.

Further I give my command that Mr. Lambrick and Strettell shall appoint one honorable European Female for the purpose of instructing my wife in learning; and I fix three (300) hundred Rupees per month for the purpose of my wife being taught Bengali and English learning.

Further if at the time of my death there be no son born from my loins or an adopted son I hereby give my commandment to my wife that she shall agreeably to the shastre of the Hindoo usage according to Beedbaun Law receive a proper male child of the age of four years as adopted son for me. If living a male child I depart this life, and if that son die childless before he attains the age of eighteen years, I give my commandment to my wife that she take for me a proper male child agreeably to the shastre and usage of Hindoos. If my adopted son taken by my wife die without attaining the age of eighteen years, in such case I give my wife commandment and direction that she take another proper male child for me agreeably to the usage of Hindoos after this manner in the event of *the want of sons*.

I give her my command to take sons at different times, and if peradventure after this manner my adopted son die without attaining the age of eighteen years, and there be not any successor of mine, in that event

whatever is necessary to be done in the matter of my estate I am about to write hereinafter : further I command my wife and my executors in a special manner that by the taking of adopted sons they accomplish the desire that I have in relation to my successor ; in this matter if my wife negligently does not receive sons, I give as my command that nothing whatever shall be given to her out of my estate : Company's four hundred Rupees shall be given to my wife monthly during her life time and I give my command that the expences and disbursements for her proceeding to places of pilgrimage and for other religious acts shall be given to her out of my estate in the former manner, Company's four thousand Rupees must be given. To Gungadhur Ghose and to Dwarkanauth Chuckerbutty and Joogoo Sing Jemadar and Shaik Hyder Coachman ten thousand Rupees must be given to each of them respectively : which must be given to them respectively immediately upon my death.

In addition to this to Dwarkanauth Chuckerbutty at the rate of Company's thirty Rupees per month, to Joogoo Sing Jemadar Company's twenty Rupees per month ; and to Hyder Coachman Company's twenty-four Rupees per month must be paid, as long as these persons are living this must be paid to them in full without deduction, and after their deaths the same must be paid to the eldest son of each of them respectively or to their heirs agreeably to their direction in *perpetuity*. Besides the five thousand Rupees to Gungadhur Ghose, eighty Rupees per month must be given to them during his life time and for three generations he will get at the rate of fifty Rupees per month : to Ramlo-chun Nye during his life time Company's twenty-five Rupees per month : to Doorgapersaud Chottapadhya during his life time forty Rupees per month ; and to Navan Khansamah during his life time Company's six Rupees per month. All these bequests my executors and my son will give to them out of the interest of the Company's Papers.

Five hundred Rupees per month must be given to my friend Mr. Lambrick Sahib on account of his work and labor in his office of executor : he *will* receive the same as long as he remains in the appointment by me : and four hundred Rupees per month must be given to Mr. Strettell Sahib on account of his office of Superintendent.

And if it so happens that in the manner that I am desirous by this will to establish a successor through my son or my adopted son does not result, and I become without a successor ; in that case I give my command that having sold the whole of my fixed and moveable property and converting the same into ready money, Company's Papers shall be purchased with the whole of that in the name of the Accountant General to the Government of India at the chief Presidency of Bengal that is the Accountant General of Calcutta.

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The said Papers shall be placed in his hand as trust for the purpose of an extensive and handsome College or house of learning being built, and the house of learning shall be established at station Benjoranteath of Moorshedabad for instructing the youth of this country or of other countries, and the same shall be named Rajah Kristonauth's College: in the said house of learning shall be taught all the English Biddea Bengallee Persian and Sanscrit and English science of Medicine and Law, and the said house of learning shall be built pursuant to the directions of the Governor General and the Chief Justice of the Supreme Court for the time being, and I vest them with power to be able to make regulations and commandments for the same in the manner they think suitable, and be able to appoint the Umlahs, that is, officers for the house of learning (as the Governor's Committee school masters treasurers and secretaries) whomsoever they think; but I pray that only persons of good intelligence be appointed, and having procured such person to be brought from Europe at suitable and large salaries, they entrust the European classical department of the house of learning into the hands of those intelligent persons. Further I pray that the Governor General and Chief Justice will be pleased to become Patrons, that is, the rank of guardian of the house of learning, and that they publish the extent of the property deposited by me through the medium of their own writing, that is, that they make over the amount of money deposited in trust in writing to the house of learning.

Further, besides what is expended in establishing this house of learning in an excellent, extensive and beautiful manner, if my estate remaining shall exceed the same, that is, after the establishing that there be any residue, I hereby give my sanction to the Governor General and the Chief Justice that they distribute whatever is the surplus among the poor. Having revoked all the wills that I have previously made I appoint through the medium of this will William Stephen Lambrick and Charles George Strettell my Executors, and making the last mentioned Sahib the superintendent of my estate I give as my command to the other Executor and to the other persons who are appointed to offices through this will that they do their business attending at all times to the advice of the last mentioned Sahib only year 1844 the 7th day of January Station Calcutta.

Witnessed by,

Rajah Kristnauth Roy Behadoor.

Thos. E. M. Turton.

Thos. C. Morton.

W. C. Blacquiere.

On the 16th of September, 1844, a charge was preferred before the Magistrate of the Zillah of Moorshedabad against Rajah Kristonath Roy, on the ground of his having used great personal violence towards a servant in his employ, of the name of Gopaul Duffadar. The Rajah was, in consequence, on the following day, arrested by the order of the Deputy Magistrate, and remained several days in confinement at Berhampore, until he was released on bail. He then removed to Calcutta. About the 27th of October, news reached him that Gopaul Duffadar had died of the injuries received at his (the Rajah's) hands, and that, in consequence, proceedings were going on in the Court of the Magistrate of Moorshedabad, a purwannah or order having issued for his apprehension. Upon receiving this intelligence, and being naturally a person of weak disposition, and enervated by his dissipated habits, the Rajah became exceedingly alarmed, abstained from food, and exhibited great agitation, terror, and restlessness of mind and manner. On the 31st he sent for Mr. Strettell; an interview took place between the Rajah and Mr. Strettell, in the presence of a Mr. Herklotts and a Mr. Young. He then exhibited great alarm, declaring he would rather kill himself than be led a prisoner from place to place. This interview took place about half past 10 o'clock A. M. About the period of its termination the Rajah retired, and brought out a document, and asked the parties present to attest it. Herklotts and Young hesitated doing so, doubting whether it would be correct for them to comply, in consequence of the apparently disturbed state of the Rajah's mind, but on Mr. Strettell's expressing his opinion that harm might result from their refusal, they all executed the instrument, after which it was signed by the Rajah, (at the request of Mr. Strettell, on each sheet, the document being exceedingly lengthy).

About three o'clock of the same day Mr. Strettell

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received information of the fact of a purwannah having arrived from the Magistrate of Moorshedabad, and that it had been endorsed by a Justice of the Peace for Calcutta for the apprehension of the Rajah. He proceeded immediately to the Rajah's house, accompanied by Herklotts, and informed the Rajah of what had taken place, and advised him at once to leave the house, and conceal himself until measures could be adopted for admitting him to bail. Upon this the Rajah became greatly distressed and bewildered: he left the room, where they were assembled, saying, he would fetch some money and go with Mr. Strettell. Some minutes having elapsed without his returning, Mr. Strettell sent servants in search of him, and it was presently discovered that he had shot himself with a gun, and was lying in a sitting posture in a corner of the room quite dead.

The paper writing signed by the Rajah in the presence of Strettell, Young, and Herklotts on the 31st, was in the Bengali language and character, of which the following is a translation:

I Sri Rajah Kristonanth Roy Behadoor zemindar of Pergunnah Cauntonggur and so forth within the Provinces of Bengal and Behar, inhabitant of Cossimbazar in Zillah Moorshedabad, write and make this Will.

Directions for the disposal and management of my zemindaries, that is, landed property Talooks subject to the payment of revenue and so forth and dwelling houses and gardens tanks or any other property or furnitures and wearing apparels and jewellery and gold and silver and brass and bell-metal and stone and so forth metals or stones or clothes whatsoever there is belonging to me in my own name or that of other persons moveable or immoveable on my decease: rules to be observed under different circumstances are laid down in the different Paragraphs of this will or Odomottee Puttro according to which directions every thing is to be carried into effect.

1st. Paragraph one.

After my decease the expense attending my first Shradha shall not exceed 12,000 (twelve thousand) Rupees, and at the Shradha which takes place on the expiration of one year which is denominated Sopin-

dicorn the expense incurred shall not exceed 9,000 (nine thousand Rupees.)

A statue in stone shall be formed after my picture which is in my sitting room at Banjatyia and placed in that room.

My annual Shradha shall be performed every year according to the established usage of our ancestors. And the Shradhas, &c. of my ancestors shall be performed in the same manner as they have been performed every year, but the expense shall not exceed the established rule thereof.

At present I have no son but only one daughter. If at the time of my decease my wife Sreemotee Sarodahsoondery Dossee has expectation of bearing a child, and when the full time arrives a son be not born but a daughter, in such case I direct that my wife Sreemotee Sarodahsoondery Dossee shall proceed to Guya and perform my Sopindicorn Shradha, that is the ceremony to be performed 12 months after my decease. The expense attending which and her journey there and back again shall not exceed 30,000 (thirty thousand) rupees on my account, after which she will cause a Sree Sree Ishwur Seeb Thakoor's Temple to be erected at the Sree Sree Ishur Cashee, of stone in the gothic style at the expense of 1 (one) Lac of Rupees, by an experienced English gentleman, which when completed she will immediately have a handsome image of Seeb and Goury established therein, the expense attending which said establishing, and my wife's travelling charges, shall not exceed fifty thousand Rupees for the establishing, and ten thousand Rupees for the travelling charges.

For the monthly and yearly expense that will be incurred in the premises, one half of the income of my Jagheer at Ghazeepore was allowed by my ancestors for the worship at Sri Sri Ishwar Bindabun, which for the purpose of defraying the expenses of the Seeb established by me shall be divided in equal shares, and four annas allotted to the worship at Bindabun, and the remaining four annas to the worship of Seeb at Cashee, and my name and the name of my wife and the year shall be inscribed on that temple. And the remaining half of the profits arising out of my Jagheer in Ghazeepore entitled Doolia Behara shall be allotted to defray the expense attending the ancestral worship &c. at my house at Cossimbazar, which worship is to be performed in my ancestral dwelling house at Cossimbazar. And that worship and so forth and the marble hall and pooja house where the Doorgotsova is performed these two copartments of the dwelling house as long as my wife exists shall be under her control, after which my Sri Sri Ishwar Gooroodeb and his descendants generation shall obtain money from the income of the above Mehal, and

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perform the said worship, and render a monthly and annual account thereof to the Collector of Zillah Moorshedabad, and not make unnecessary or wanton expenditure on any account whatsoever, whoever does so will be punishable for the same. He must on no account think that the said Jagheer Mehal has become his, but consider himself only the manager of business: should he act improperly in any manner some other person shall be appointed through the intervention of the Court of Wards, and the worship carried on in the above manner, and no one whomsoever will ever at any time have the power of mortgaging or selling the said Jagheer Doolia Behara Mehal, and they will consider this to be equally applicable to the two compartments of the Cossimbazar dwelling house.

3rd Paragraph (Three.)

At this present time I have one daughter living, in the event of my dying before a legitimate son is born to me I direct in such case that if at the time of my decease my wife Sree Mutty Saroda Soondery Dossee be pregnant and at the full period a son be born it is well, he shall be my heir and successor.

But in the event of a son not being born, and a daughter being born, my wish and direction is, that there is no necessity to take any son into adoption. And in the event of a son being born and dying before he attains full age, that is the full age of eighteen years, in such case an adopted son shall not be taken on any consideration whatsoever.

4th Paragraph (Four.)

I give this further direction to my wife Sree Mutty Saroda Soondery Dossee that she must never conduct herself in any manner contrary to the established usages of my family.

In the event of a son being born to me she will ever continue to live with him united in meals at the Rajbatty on peaceable terms, and pass her life in peace and quiet.

But should it happen that she quarrels with my son, and through the advice of evil persons excites discord, in consequence of which a number of suits be instituted and thereby cause detriment to my estate, in the manner that my mother Thakoorany has quarrelled with me and caused me to suffer great loss in money and effects &c. If my wife quarrels in this manner and quits the house, she must immediately proceed to Sri Sri Bindabun and remain there the remainder of her life and not receive more than a monthly allowance of three hundred rupees.

And in the event of her continuing to live in this country (that is Bengal) she shall not receive more than one hundred Rupees monthly

on any account. But if she continues to reside in the Rajbatty according to the established usage of the family without exciting quarrels and dispute, she shall certainly receive food and raiment agreeably to the established usage of the family.

And if she should wish to perform a pilgrimage to Sri Sri Ishwor Juggernaut Khetter, she shall receive fifteen thousand Rupees for defraying the expenses attending the same.

If a son be born to me and attain his full age and not supply my wife with food and raiment and maintain her, in such case in the event of there being no fault on the part of my wife she should receive what is directed above.

And if my son quarrel with her and give her annoyance without any fault in her part in such case my wife Sree Mutty Sarodah Soondery shall have a dwelling house for her residence and one thousand Rupees monthly.

This rule is to be considered applicable to the period when a son of my body shall have attained full age and not to that of non-age that is during his minority.

5th. Paragraph (Five.)

I hereby direct that if a son of my loins should be living after me the whole of my Zemindaries and so forth will remain under the control of the Court of Wards, and the expense of founding and establishing the religious worship &c. directed by me in the second paragraph hereof shall be defrayed from the income of that Jagur mohal or from the income of some other mohal in like proportion.

The two departments of the Rajbatty shall remain in the same state as they are now, and not be placed under the charge of any person, and my wife defray the expense thereof, and when the son of my body attains full age he will do so according to the established usage.

The purpose of my directing in this manner is that in the event of my being childless, that is, without a son, affairs shall be carried on agreeably to the directions given in the said second paragraph and all the other dwelling houses that remain shall be sold and the proceeds thereof realized, but such shall not take place as long as my wife is in existence.

6th Paragraph (Six.)

I hereby direct that my wife shall cause my daughter's nuptials to be celebrated under her own management and control and have her married to a son of a high Cooleen of good dispositions, after having caused the said Cooleen's son to be well instructed in reading and writing, and cause my daughter to be instructed in reading Bengali

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and English and educated in like manner as the individual that becomes my son-in-law, after which the expense attending the marriage of my daughter is not to exceed seven or eight thousand Rupees and she will cause my daughter to be married when she shall have attained eleven years of age, and after that cause my daughter to receive instruction from a teacher until she attains her eighteenth year of age and she shall place the individual that shall become my son-in-law for education at the Hindoo College at the town of Calcutta.

When my daughter attains her full age she shall receive five thousand rupees as the price of a dwelling house and fifty thousand in cash and not receive any thing further, and live separate, and she will not have any claim herself or any one belonging to them at any future time whatsoever.

7th Paragraph (Seven.)

I direct that no more than ten thousand rupees shall be expended at the marriage of my son, and that the marriage of twelve Brahmins of the village shall be first caused to take place, and after that the marriage of my son.

I fix the sum of five hundred Rupees for the marriage of each of those 12 Brahmins. The expenses of some thereof may exceed five hundred Rupees, and of others fall short thereof, but this six thousand Rupees is not to be considered as part of the above ten thousand Rupees.

My son is to be married when he is fifteen years of age; and with respect to the female child that is to become my daughter-in-law, I direct my wife to select a highly respectable Cooleen's daughter, that is very handsome, and cause her to be very well educated that is instructed in Bengali and English reading and writing and then married.

8th Paragraph (Eight.)

I direct that if I have a son begotten of my own body at my death, in such case the whole of my property, that is, zemindaries, talooks, lands, and dwelling houses, gardens, tanks, and other fixed and moveable property in my own name and the name of others &c. whatsoever there is and is left remaining, the whole of the said property and so forth shall remain under the Court of Wards as long as my son shall continue a minor, that is, not attain his full age; from the produce of which sixty thousand rupees and no more shall be allowed annually for the expenses of my family, besides the charges for the education of my son and daughter which shall be fixed by the Gentlemen of the Sudder Board of Revenue according to their judgment, and they will direct the supply of books and such other articles as may

be required from time to time, and when my son shall have become of age that is agreeable to the regulations he shall have completed his eighteenth year, they will give him the whole of the zemindaries and so forth, but shall on no account give him the cash which is accumulated after defraying the expenses during his minority until he shall have attained his twenty-fifth year, because that at the age of eighteen a person is not in possession of his full understanding and judgment.

But in the event of my son after he shall have become of age (that is completed his eighteenth year) wishing with the said money to purchase any zemindary yielding good profit or to take into mortgage or zemindary under a conditional bill of sale from any individual, the Gentlemen of the Court of Wards will supply what is required to effect the same from that money, and when he attains his full age should the said Gentlemen be of opinion that he has not completed his education and be sound of judgment, he shall continue to be considered a minor until such should take place. An Englishman and an assistant shall be appointed for the purpose of instructing him in Bengali and English, and a pundit and a Gooroomohashoyee for the purpose of instructing him in arithmetic; a house shall be hired near the house of the Collector of Zillah Moorshedabad, in which he shall study from the hour of 10 to the hour of 5 daily, and repeat what he has learnt weekly to the said Gentleman, that is be examined by him, and he will also undergo an examination by the commissioner and agent of that place every six months. He shall receive instructions associated with 7 or 8 youths of respectable families of that zillah that is Moorshedabad that by the competition with them his studies will be more effectual.

And during the last two years the above gentleman will appoint an able Moulvy to instruct my son in the Government Regulations and the Persian language, that is that he may require a slight knowledge of that language and nothing further.

But after he shall have been instructed in the English language, if he can be instructed in the French language and reading and writing the same during the said last two years in the same manner as in the Persian, it will be so much the better; I therefore humbly entreat the said gentlemen if time admit of it and be not detrimental to his other studies, that they will cause my son to be perfectly educated; because the sons of the opulent persons of this country are in general ignorant, and being puffed up with pride from their wealth oppress others.

I therefore entreat that he may only receive food and raiment until he attains his sixteenth year, and from the age of 14 years one hun-

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dred Rupees monthly as pocket money, and from his sixteenth year until he attains his full age five hundred Rupees as pocket money, but if on his monthly, six monthly, and annual examination, he does not give satisfactory proof of his learning his pocket money shall be reduced in proportion.

9th. Paragraph (Nine.)

I most earnestly intreat the British Government of this country to extend their kindness towards me with regard to the following point which is: that in the event of *my not having a son* of my body born, or if born he should die, they will take possession of the whole of my zemindaries fixed and moveable property, and with the exception of the gold and silver, brass, bell-metal, stones, and other metals and articles made of stone, and so forth, and furniture which are in my house at Cossimbazar, that is the furniture of my Banjatya house, sell every thing that is left at the time of my death and purchase good zemindaries with the produce thereof.

Of the whole of the zemindaries belonging to me, I have allotted the Doocha Behara Jagheer that is in the Gazipore zillah for my own and my ancestral religious worship; all the remaining zemindaries have been let out in Puttnee under farm save and except Beirherbund Gola and Kismut Bhicturbund and Kismut Joybarey in zillah Rampore, I therefore pray that they will appoint one or two well experienced, learned, and impartial gentlemen of the Civil Service as Special Commissioners for the purpose of effecting the measurement assessment and settlement thereof, after which whatever profit remains after paying the Government revenue, out of the collections realized under such settlement from the said mohal and also from other mohals, shall be applied to the establishment of a college, that is a school in my name that is to be entitled "The Kristonauth University of Banjatya" in my large two storied house and two lower roomed house at Banjatya, in which school due instruction shall be given to children in the English, Latin, French, Sanscrit, and common Bengali and the Persian and Arabic languages and sciences, and near the said house an Hospital shall be established and an experienced English Physician and proper Natives appointed to the Hospital to manage and carry on the business thereof.

And if I have a son in such case also they will cause the measurement assessment and settlement of Bahirbund and other Purgunnahs situate in zillah Rungpore to be made by a Special Commissioner.

Should I not have a son, I most humbly solicit the Government to sell all my property before mentioned in the usual manner and place

the interest of the proceeds thereof and the whole of my zemindaries under the charge of the Collector of the different zillahs, and that the British Government will through kindness towards me take my above mentioned College and Hospital under their own control, and defray the expenses thereof from the residue left after discharge of the Government Revenue.

And the due examination education and proper management of the children attached thereto is left to the care of Government, who will allot to such poor children as are unable to provide for their own maintenance while carrying on the studies what they consider suitable to their respective circumstances and not remove the College.

10th Paragraph (Ten.)

I direct that as long as my wife shall be living, she shall receive a moiety allowance of fifteen hundred Rupees, provided no son be living and she continue to reside in the dwelling house at Cossimbazar and on her death the said money shall be appropriated to the purposes of the College.

I have a very confidential servant named Sri Kissubchunder Sircar to whom (that is the said Kissibchunder Sircar) One Lack of Rupees shall be paid after my decease, from the profits arising out of my zemindaries under the Court of Wards as soon as the same shall have accumulated.

The said individual is a very confidential servant of mine for which reason I have directed and ordered this money to be given to him in order that he may ever live in happiness; and the said individual shall receive a monthly Pension of fifty rupees to be continued to his sons, grandsons &c. but none beyond grandsons shall receive the same; they will also give the said Kissubchunder Sircar the Kharija Chotee (i. e. alienated portion) of the Shergur purgunnah and Bellyapore situated in the Jungle Mehal in Puttneeree tenure, the Sudder Mulgoozary or Government revenue of which mehal is sixteen hundred Rupees, which said mehal shall be given to him on lease at a rent of fifteen thousand Rupees, but the price to be paid for the said Talooks must not exceed one thousand Rupees, as I have fixed the price thereof at one thousand Rupees and no more.

11th Paragraph (Eleven.)

I have the following very favorite horses whose names are Sultan, Napoleon, and an Iron Gray English horse named Monkey, and four Iron Grey horses that go in fours—these seven horses, a small buggy, and a drag for driving four horses which has no top, that carriage and Secunder Guj and Chanettara and Chhutta Buchcha (a small young one) these three elephants, and six new double-barrelled guns

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by Smith, the gun commissioned by Mr. Bateman, and two pistols I give unto Sri Kissubchunder Sircar.

The said individual shall not have authority to sell the same but only keep them for his own use; he will also take unto his use a single-barrelled rifle (the maker of which is Long) but as long as the elephants and horses are living they shall be supplied with food from my Sircar (i. e. establishment.)

The said individual will use the said elephants and howdahs and horses with their saddles and bridles, as also the carriage horses with their harness.

I also give outright unto him, that is, to the said sircar, a lower roomed pukka house which I have at Panchanun Tullah, and should I not have a son, in that case such of the following articles (that is my diamond star and diamond guard chain and two common gold watch chains and two very small watches (made by Mc. Cabe) and a diamond ring appertaining to the above star and chain, and excellent large pearls, seventy or eighty in number, and one large musical box and gold and silver plates, to the value of ten thousand Rupees) as he selects and all the furniture of my Banjatya house, consisting of chairs, couches, tables, cots, large and small pictures, and two lustres of six candles and two of eight candles and one of twelve candles and twenty pair of wall shades, that is, twenty brackets, the value of all which articles is about eight thousand Rupees, all these articles after my death are to be given without delay. But the diamond star and pearls that is the above mentioned jewellery, in the event of my not having a son, or if I have one and he dies before he becomes of age while young, that is before he obtains possession of his estate during his minority, in such case the said Kissub Chunder Sircar shall have the said articles, &c.

There are two Lacks of Rupees more or less deposited in the Supreme Court for the monthly allowance of my grand-mother, which after her (that is my grand-mother's death) shall be paid to the said Kissub Sircar; and the money which is deposited in the said Court for the monthly allowances of my mother shall after the death of my mother be held by the Company, and the blind, lame, and crippled supplied with food daily from the interest thereof.

On the decease of my grandmother, the above two Lacks of Rupees more or less shall be given to the said Sircar without delay. I withdraw all title which I have therein and make over the same to the said Sircar.

If I have a son and he should after my mother's death wish to obtain the money that is in deposit for the monthly salary of my

mother, she shall not have the same on any account whatever, the said money shall remain in deposit with the Company and helpless persons of the before mentioned description supplied with food from the interest thereof.

12th. Paragraph (Twelve.)

I direct that if there be a son after my death in such case my wife Sri Motee Sarodasoondery Dossee and another good and proper person, from whom security shall be taken, shall be appointed Executors, who will collect together my Monies in cash bonds and so forth, and the same shall be deposited with the gentlemen of the Court of Wards to be invested in Company's Paper, after which when my son attains his full age he will in the usual manner in the manner before directed receive the entire estates.

If I have no son, the directions that I have given in the different paragraphs hereof shall be carried into effect.

I have therefore written these twelve paragraphs with my own hand, after a mature consideration, and intreat the persons that are entrusted with the management of my affairs not to act unkindly towards me, but carry into effect all that I have herein directed truly and faithfully.

And I most humbly and earnestly intreat that the British Government will pay strict attention to the directions given in this will, and kindly act in such manner as may prevent the frustration of my intent and directions, and display their kindness in such manner as to cause the same to remain undisturbed for ever, more so as that not a single letter of what is herein written be deviated from.

This my Will and Testament is completed in these twelve Paragraphs,

The year 1844 dated the 30th thirtieth of October Wednesday at Calcutta.

These twelve Paragraphs have been written with my own hand there is not a single letter in the hand writing of any other person except the names of the Witnesses which shall be written.

That alone is in the handwriting of different persons thus.

From the 31st of October, the day of the death of the Rajah and of his executing his will dated the day previous, no claim was set up, nor was any thing mentioned by Kissupchunder as to the fact of his being an executor or legatee of Kristonath Roy; but on the 5th of December following, Kissupchunder produced a paper alleging the

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same to be in the handwriting of the Rajah, and to have been given him personally by the latter two or three hours after it was written. It was in the Bengali language and character, and purported to be a codicil to the Will of the 30th of October—the following is a translation.

To the virtuous.

Srijut Kissupchunder will know that in my wooden portable box, the money and notes that are there, and the two several small watches that I have in use, which I purchased three or four days ago, and the chain, those I hereby give; and in my box the key of the iron chest that there is in that, the gems and diamonds that there are, belonging to different persons respectively, you will give those to them; and the large ruby that I brought from the shop of Hamilton and company, which is in the box, you will deliver that to them, and my will that I wrote and put in the box, and is there, delivering that with great care to the Vakeel Saheb, and taking his receipt and a true copy of the same, that is taking out probate thereof, you will keep in your custody. Let there be no deviation therefrom, only.

(Sd.) R. Kristonauth Roy.

Again the key of my box will remain with Kissupchunder Sircar; if that is done there is no fear of any thing being lost. The said Sircar is one in whom I place great confidence, I have kept the whole of my property in his custody, and have never had occasion to be distrustful: and acquittance shall not be exacted from him, because I love him equal to my son or even more, for this reason I have given him the said money, and given my command to give him the same.

R. Kristonauth Roy.

In May 1845 letters ad colligenda bona of the estate and effects of Rajah Kristonath Roy deceased having been granted to the Ecclesiastical Registrar of the Supreme Court, the box alluded to in the previous codicil was, with other articles, brought to the Registrar's office in the Court House, and there opened, in the presence of Sir T. E. M. Turton (the Registrar); and in it, among other papers, was found one in the Bengali language and character, purporting to be another codicil to the

will of the Rajah of the 30th October. It was addressed to the Governors of the country. The following is a translation.

I Sri Rajah Kristonauth Roy write.

I part with the desire of life solely from the fear of being disgraced. I was not concerned in the matter of Gopaul's case, nor did I beat or maltreat him. This I solemnly avow. It was solely on account of the Deputy Magistrate, Chundermohun Chatterjee, that such excessive measures have been adopted towards me. I therefore write this letter that no one else may incur blame on account of my parting with my own life. Every thing is written in my will and testament. There are about 22,000 rupees in my portable box, which money I give unto my highly confidential servant Sri Kissupchunder Sircar, of whom I have made mention in the will, with which money no one else has any concern. The said person's house is at Ballypore in my chotee of the Ballypore Pergunnah, and all are aware he is a favorite servant of mine, and high in my confidence. What more shall I write now. The year 1844, Date 31st October.

Rajah Sri Kristonauth Roy Bahadoor.

To the high in dignity the Srijut Hakeeman Sahebs, i. e. the rulers.

The bill prayed (inter alia) that it might be declared that the first will of Kristonath Roy, bearing date the 19th January 1841, had been cancelled and revoked by the alterations made therein, and also by the will, subsequently prepared, altering the same; and that in case such last mentioned subsequent will should be produced, and proved to have been duly executed, then that the validity of such will might be declared:—and that it might be decreed that the alleged will of the 30th October 1844, and the two alleged codicils thereto, were not the genuine will and codicils of the Rajah K. Roy; but were (if executed at all by him) signed and executed when he was in an unsound state of mind, and incapable, by English law, of disposing of his property; or in an irritable, disturbed, and agitated state of mind, and under that excitement, which by Hindu law renders all wills, deeds, or other instruments void and of no effect, and that a feigned is-

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sue or issues at law might be directed for the purpose of trying the validity of the alleged will of the 30th October 1844, and the two alleged codicils to that Will; and the sanity of the Rajah at the date thereof: and also another feigned issue or issues at law, to try the validity of the will of the 7th of January 1841; and whether the same was revoked by any subsequent acts of the Rajah; and that if the Court, upon the finding of the issues, should decree and declare, that the wills and codicils respectively, or any of them, were invalid, then, that the defendants respectively might be perpetually restrained by the order and injunction of the Court, from further instituting any suit or proceeding in any Court in which they might claim any right, title, interest, or benefit, under either of the wills and codicils, as might have been decreed to be invalid. And that if, on the trial of the issues, the Court should find and be of opinion that the Rajah did not die intestate, then that his last will and testament might be established, and the trusts thereof performed and carried into execution, according to the legal construction put thereon by the Court: but if the Court should find and be of opinion, that the Rajah did die intestate, then, that it might be decreed and declared that the complainant was his sole heiress, and legal personal representative, and entitled to the possession and enjoyment for life, according to the laws and usages of Hindus, of all the real and personal estate of the deceased Rajah. To this bill the different defendants put in their respective answers, and the cause came on for hearing, (11th of December) and an order was made, with the consent of all parties, that certain issues should be tried on the plea side, and that in the mean time all proceedings in the Equity suit should be stayed. In the first issue, the question to be tried was, whether or not the paper writing of the 30th of October, 1844, was the genuine and valid will of the Rajah. The E. I. Com-

pany were the plaintiffs, and the Ranee and Strettell the defendants; the plaintiffs to maintain the affirmative. A similar issue was also directed, in which Kissupchunder was plaintiff, and the Ranee and Strettell defendants. This and the former issue (involving the same question) were tried at once, the same evidence equally applying to both. Another issue was directed, for the purpose of trying whether the paper writings in the Bengali language and character, purporting to be codicils to the last will and testament of the Rajah, and dated the 31st October 1844, were genuine and valid. In this Kissupchunder was plaintiff, and maintained the affirmative, and the Ranee, the E. I. Company and Strettell the defendants.

The issues came on to be tried on Monday the 15th of February 1847, and terminated on Saturday the 20th in favor of the Ranee. Many witnesses were examined on behalf of the plaintiff, but the defendant went into no proofs at all. The nature of the evidence will be sufficiently collected from the verdict of the Court, which was delivered (much in the following terms) by

SIR L. PEEL, C. J.—Although this is in form an issue directed on the equity side of the court, the principles which are applicable to the decision of it are those which guide the ecclesiastical court upon an application for admission of a testamentary paper to probate. These may be gathered from the judgment of the Privy Council in the case of *Panton v. Williams* delivered by Lord Brougham. “It is of itself not immaterial to consider that the contention of those who are setting up these papers is incumbered with so much difficulty, for whether a question arises between a will and an alleged intestacy, or, as in the present case, between one will and another of a prior date, the proof being upon the party propounding any testamentary writings, the course of administration directed by the law is to prevail against

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him who cannot satisfy the court of probate that he has established a will ; or the prior instrument which is liable to no doubt is to be established in preference to a posterior one, which cannot be so proved, to speak the testator's intentions, as to leave the Court with an opinion that it declares these intentions. There is no duty cast upon the Court to strain after probate, and to grant it where grave doubts remain, wholly unremoved, and great difficulties oppose themselves to our progress which we are quite unable to surmount. To lay down any general rule beyond this, as to the burthen of proof in such cases, is unnecessary, would perhaps be impossible, and might also be incorrect, and even dangerous. It may suffice to say that the proof eminently lies on him who sets up a will, and further that it is more fatal to him than to his adversary if he leaves difficulties without explanation : but each case must, in this respect, rest upon its own circumstances. The facts of that now before us, unexampled perhaps in any cause that ever came before any tribunal, leave many things unexplained, many things which no theory that can be formed will satisfactorily account for. But then it is much less material that those who seek to impeach a testamentary instrument should be unable to explain certain things in their case, should be forced to admit that their argument is not in every point consistent with all the facts, than that they who seek to establish the will should give no rational, consistent, or intelligible solution of those difficulties which incumber their suppositions and obstruct the path towards the conclusion they would have us arrive at. It may already be gathered from what has been said, that the Court does not feel it at all necessary to decide upon those points upon which it would be exceedingly painful to pronounce any judgment. We are of opinion, and very decidedly of opinion, that the proof is here left in such a state, as not merely authorises but

requires us to pronounce it deficient. We do not feel called upon to say that any fabrication has taken place, of the writings propounded, or that perjury has been committed in setting them up. We are of opinion that grave suspicions rest on material parts of the case, which it was necessary to remove before probate could be given, and that they have not been removed.”

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In *Harwood v. Baker*, 3rd Moore P. C. cases p. 290, Mr. Justice Erskine, in giving the judgment of the Privy Council, says, “Their Lordships are of opinion that in order to constitute a sound disposing mind, a testator must not only be able to understand that he is by his will giving his property to one object of his regard, but that he must also have the capacity to understand the extent of his property, and the nature of the claims of others whom by his will he is excluding from all participation in that property, and that the protection of the law is in no cases more needed than it is in those where the mind has been too much enfeebled to comprehend more objects than one, and especially when that one object may be so forced on the attention of the invalid as to shut out all others that might require their consideration.” The case of *Ingram v. Wyatt*, 3d Haggard’s Ecclesiastical Reports, p. 466, and the same case in 1st Haggard’s Ecclesiastical Reports, p. 470, may be consulted, to see that testamentary incapacity is not to be confounded with insanity; and that in cases of a doubtful or suspicious character, the mere formal execution of a will, without any thing to prove the capacity or supply the want of instruction, is of little weight.

The evidence in this case is not sufficient to satisfy us (to adopt the language of the Court in the case of *Dufour v. Croft*) “that the contents of this will and codicils originated with the testator, or were adopted by him deliberately, at a time when he was in a condition to exercise, and did exercise, thought, judgment, and reflection res-

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pecting the act which he was doing, and the contents of the papers which he signed," assuming the signatures of the codicils to be sufficiently proved. This will and these codicils depart materially from prior testamentary dispositions of the testator, made at no very remote period before. Large and apparently inappropriate gifts are lavished by them on a menial servant. This if it were done in a case otherwise free from suspicion would be of comparatively little weight. The absence of the provisions for adoption contained in the former wills is unexplained; those dispositions evinced, in more than an ordinary degree, the usual strong desire of a Hindu for male succession; this will, if prepared at the time when the only evidence on the point asserts it to have been prepared, would, under the then circumstances of the Rajah, evince very slight regard for the perpetuation of his family and race, which might have been continued in a male succession through the sons of daughters hereafter, had such been born, though no son were born to him, and he had changed his mind deliberately on the subject of adoptions. The posthumous daughter is not provided for by this will, whereas the former provided for all daughters that might be born to him. It appears that he knew or believed that his wife was then pregnant. The provision in the former wills for similar charitable purposes to those contained in the present, was on a very remote contingency, and that provision appears to have been suggested to him originally. The learned Counsel for the defendants on the issues, advanced hypothetical cases on which we decline offering any opinion. Conjecture is a dangerous approach to a judicial decision. The destruction of the theories put forward might be complete; and yet the will not be sufficiently proved. The will and these codicils, are not proved to have been communicated in their preparation to one single person. The witness Ramchunder Seal is the only witness who

spoke to seeing the Rajah actually engaged in writing the will. His evidence was a surprise on the Advocate General, as he, with accustomed candour, admitted. No explanation was given why the story was not told sooner. The preparation of these papers was too important a matter to have been overlooked. The Government were parties to the suit, their case had all the legal talent employed in it that it could receive ; and Kissubchunder had also early the aid of competent legal advice, and no case could have been more zealously, skilfully, or eloquently conducted than his has been by Mr. Dickens. This man Ramchunder asserts that he saw the Rajah employed in the actual writing of this will, that he was close to him, and so near as to see that he was writing in the bengali character ; that the Rajah wrote for three successive days, terminating his labours on the 27th October ; that he wrote (in the language of the witness,) out of his own head, and had nothing to copy from, that he saw. He states further that at the conclusion the Rajah mentioned that his labour was over, and informed the witness, in answer to an inquiry from him, that it was his will.

This will contains many and varied directions, and we cannot believe that a young man of imperfect education, and of the habits of the Rajah, could at any time, least of all with a mind so excited and disturbed, make, *currente calamo*, a first draft so clean as the present, which is very long, and has scarcely an interlineation, erasure, or alteration from the beginning to the end. Our own experience enables us to say that to make at once so clean a draft would be a thing most uncommon, even in a practised draftsman in the preparation of such a will as the present, which contains many varied and minute directions. Had the evidence shown that he wrote from another paper, it would have been most important that that paper should have been produced or ac-

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counted for. The witness says that the Rajah wrote out of his own head, and copied from nothing that he saw. It is impossible that seated, as he says he was, close to the Rajah, so near that he overlooked him, and saw the character of the writing, he could have failed to observe, had the story been true, whether the Rajah copied what he wrote from another paper. No one observant of another in the act of writing, who writes a long draft from another paper, can fail to see in the manner of the writer, from his attention now being given to his draft and now to the paper whence he copies, that in fact he is writing from another paper. This man, who admits that on former occasions of the Rajah's visits to Calcutta, he had been only for a few minutes at a time in the Rajah's presence, is suddenly, by his own account, seated for hours together close to him, apparently without any particular object to be promoted or being promoted by his presence.

It is remarkable that so little proof is produced that the will is a holograph of the Rajah, and that proof of so unsatisfactory a nature. It depends on the evidence of Mr. Herklots and of Ramchunder Seal, on neither of whom, uncorroborated, can dependence be placed. But if it be a holograph of the Rajah, still the time is not shown, when it was really written, and unless it were shown not merely that the Rajah's hand wrote it, but that his mind went along with it, understood fully and assented to its provisions, the mere proof in such a case as the present of its being a holograph would be of little weight. It is to be observed that the instrument is dated on the 30th October; the day preceding his death, and the day on which he received the fatal intelligence of the death of the man on whom he was charged with having committed a dreadful outrage. It would be singular if the Rajah in his then greatly excited state of mind, for the evidence shows that he was so on that day,

should have been able to make so good a copy even as this instrument is, and that he should then have had the power to apply himself carefully to its preparation.

We have no explanation whatever of the concealment, or of the preparation of the instrument, which is not one that we should, on the evidence, infer that the Rajah could himself unaided have planned and composed. We are not merely uninformed of the true state of facts, but we have a false account given to us of the preparation of the will. This alone is a startling circumstance, and raises a presumption against the case, which false testimony is brought forward to support, and that unfavourable presumption is made greatly stronger, for it appears that Kissubchunder, the legatee to whom such large and strange bequests are made by the will, entered into a corrupt contract with two of the attesting witnesses to it, who had been examined before the coroner, and whose depositions there were of an unfavourable nature to his case, to share with them, in the event of his success, his legacies under the will. I believe it to be wholly unprecedented in the annals of the English Courts, that a devisee ever so acted and prevailed, and I will not be the first to set so dangerous a precedent. In order to remove these strong presumptions against the will, it would have been necessary to prove clearly that Kissubchunder was the ignorant dupe of the fraud of others; and to explain clearly the real facts of the case involved in darkness and, as we suspect, studiously concealed. These difficulties, great as they undoubtedly are, are heightened by other parts of the case. The Rajah is shown to have had his previous will prepared by Mr. Strettell, in whom he placed confidence. That confidence was proved to be continuing. If from any unexplained cause he desired to conceal from Mr. Strettell that he was making a new will this would not account for his concealment of the matter from every one, still less would it account

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for the mystery which hangs over the preparation of the will. The codicils increase our difficulties. If the codicil A and A No. I, (a) be a genuine instrument, it is most singular that the Rajah, if he knew and understood the nature of the will which he had executed at 9 o'clock or thereabouts of the morning of the 31st October, by which he had appointed the Governors of the country, to carry his will into execution, (for such is, in substance, the provision,) should, within two short hours afterwards, associate with them, (the Governors of the country,) his own menial servant in the execution of the will, by directing him to take probate of it. That the Rajah knew the nature of an appointment of executors is proved by his former will, and by his directions to Mr. Strettell as to the second will to leave the names of the executors in blank. There is evidence of opinion as to the genuineness of the handwriting to this and the other codicil, and it is uncontradicted; but such evidence is in its nature weak and fallible; and men are here adepts in forgery. The keeping back of this codicil is unexplained, and that is also suggestive of some suspicion on this case. The contents of it are not reconcileable by us with those of the codicil B: (b) and the possession of the money by Kissubchunder is not reconcileable with either. None of these codicils are so brought home to the testator, or his repositories, as to be sustainable if otherwise unimpeachable, for mere proof of handwriting is insufficient to establish testamentary papers. *Wood and others v. Goodlake and others*, 2d Curteis, p. 177. Beset with all these doubts, if we turn to the evidence as to the testamentary capacity of the Rajah, we find on that point no certainty, or absence of reasonable doubt. It appears very clearly that Mr. Herklots hesitated to sign

(a) This was the first codicil
recited above.

(b) The second codicil recited
above.

as an attesting witness, because of his doubts of the testator's sanity. This he does not deny; but he denies that that was his sole reason, and assigns some others not of a very satisfactory nature. Mr. Hedger, who had seen the testator at 5 o'clock on the afternoon of the 30th, deposed before the coroner to his insanity. The evidence of Mr. Young before the coroner, is also suggestive of great doubt as to the testamentary capacity, for he says that his opinion whether he was sane at the time of executing the will, would depend on the contents of the will; and therefore if it required a knowledge of those contents, then to enable him to speak decidedly on the testator's sanity at that point of time, viz. the time of executing the will, his mind could not have been made up that the testator was then of competent capacity. He stated before the coroner, that he believed the Rajah to have been an irresponsible agent at the time of the commission of the fatal deed; and that he could not say when responsibility ceased. He represented in his evidence on the issues, that he meant to say that he thought the Rajah insane, at the time only of the commission of the deed, and that on the ground that he believed every man who committed suicide to be insane. This is not the light in which his evidence would have appeared to those to whom it was addressed before the coroner, nor can we reconcile this explanation with the evidence which it is meant to explain. Mr. Strettell's evidence must be viewed with great jealousy. But on an attentive consideration of it we see no reason to doubt, that though he attested the Rajah's will, he believed that as to the Rajah's capacity which he asserts he did then believe. His conduct in attempting to screen a criminal from justice is highly censurable, especially in an attorney of this Court, even though it were merely a temporary concealment. His connection with this unhappy young man and his father, may offer some extenuation of it, but can

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not justify it. It is important to consider how his evidence is corroborated. The conduct of an attesting witness who speaks to incapacity in the testator, varies in degree of culpability with varying circumstances. If, as in *Panton v. Williams*, he declare that the testator was incapacitated from intoxication at the time of attestation, he may deserve the strong observations there passed on such a witness. In *Dufour v. Croft* it is said that such evidence must be attended to and weighed, though received with caution. Mr. Strettell is confirmed as to the greater part of the *facts* to which he deposes, and his evidence is shaken as to none. He was examined before the coroner, and though his deposition could not be read to confirm his testimony, yet if it had been at variance with his testimony on the trial of the issues, it might have been given in evidence to contradict him. He was examined before the coroner before he became proctor for the Ranee. Mr. Young states that he believes Mr. Strettell said their signing would be satisfactory to the Rajah, or something to that effect, and Mr. Herklots says, that he, Mr. Strettell, may have said that it would calm the Rajah's mind, though he does not recollect it. Mr. Hedger founded his opinion when examined before the coroner in part on certain paragraphs of the will, which had been read to him in a derisive manner by the late Baboo Dwarkanath Tagore. The evidence of all these witnesses before the coroner, whose depositions I have referred to, are to be viewed as subject to some deductions in consequence of the probable desire of these parties to avert a verdict of *felo de se*; but, though their evidence may be over-coloured, we see no ground to doubt that the Rajah was, at the time of the execution of his will, in a state of mind well calculated to inspire strong doubts of his competency to make a will. The opinion of Mr. Strettell may or may not be correct, but we have no ground for doubting its sincerity. Mr. Russell, Mr. Wallace, and Prosoonocoo-

mar Tagore, and the letters of the Rajah himself, show that he was not irrational or insane, in the ordinary sense of those terms, down to a short time preceding his death. But Prosoonocoomar states that the Rajah underwent a great change at the time when he heard of the man's death; his excitement had increased and was greater at 9 o'clock in the evening than at 5 o'clock in the afternoon of the same day. Mr. Hedger saw him at 5 o'clock in the afternoon of that day. The evidence shows also that the excitement was progressive, as it was likely to be; for Mr. Herklots says, it had increased at 2 o'clock of the 31st, and we cannot, reviewing the whole evidence, but say that testamentary capacity is not established to our satisfaction, still less can we say that its free exercise is established. The wise caution of the English Courts as to wills on which suspicion rests should not be relaxed here, least of all in the case of native wills; frauds on the living are more open to detection; but when death has removed one whose succession is the subject of dispute, it may be impossible to unfold in its true character what is dark and difficult, and suggestive of grave suspicion; and the law does not throw on the heirs this difficult task of elucidation. It becomes a Court of Justice to pause, and require, in such cases, that those who propound the instrument should remove the suspicions which attach to it. Here doubt of the gravest kind hangs over every part of the case. Nothing is clearly made out except the mere formal proof of execution, and even that, by Mr. Strettell's evidence, appears to have been a prompted act; one executor is proved to have corruptly colluded with two of the attesting witnesses to the will; a false account is given of the preparation of the instrument; it is at variance with his former dispositions at a comparatively recent period, and with his presumable intentions; it is not proved to have been communicated in its progress to any one; his confidential

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adviser, who had prepared his former wills, is not consulted; this unhappy man, who so much needed advice, is not shown to have had the benefit of any in the preparation of these important instruments, advice, to which when he needed it less, he had previously had recourse: his mind, at no time a strong one, a prey to anguish and fear, might easily have become unsettled and weakened at the time of the execution of these instruments; from his dreadful situation, charged with a shocking offence, and flying from justice, he might be subjected to vile influences; and we think that, in a case so dark and wicked in many of its parts, so open to suspicion in others, such proof as has been given is very deficient. I know not how we could found any decision in favour of these instruments on any principle recognised by the English Law; and in applying the wise cautions of the English Ecclesiastical Courts to such a case as the present, we feel that we are only acting in unison with the general principles of the Hindoo Law, when applied to an analogous subject, that of donations inter vivos, principles deserving of the praise which Mr. Cochrane passed on them, but unfortunately too vague and general in their expression.

We cannot conclude this case without expressing that we join with Mr. Clarke in his commendation of the course pursued by the Government with relation to it. It is consistent with their uniform conduct, and is such as the high character of their legal advisers gave full assurance of. It is due also to the bar to say, that the case on all sides has been conducted with a zeal, an energy, and a degree of talent that would do honour to any Bar, and that the comments which their duty to their respective clients drew from them on the conduct of different parties have been restrained within the due limits within which regard to the just rights of others and to their own characters as gentlemen, will, I trust, always keep those censures which it may be their duty as Advocates to pass on the conduct of others.

The cause now came on for further directions upon the finding on the issues.

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Mr. *Clarke*, Mr. *Morton*, and Mr. *Taylor* appeared for the complainant.

Mr. *Cokvile* A. G. Mr. *Prinsep*, and Mr. *Ritchie* for the E. I. Company.

Mr. *Dickens* and Mr. *Sandes* for Kissubchunder.

Mr. *Cochrane* and Mr. *Macpherson* for Mr. Strettell.

It was now urged on behalf of Mr. Strettell that the will of 1848, under which he was appointed an executor, had never been absolutely revoked by the execution of any subsequent will, even though a change of executors had been directed.

And secondly—Assuming a distinct revocation of the first will, that nevertheless it now stood revived, in consequence of the rejection of the last will, and the non-appearance of any intermediate will: the intention of the Rajah to die testate being manifest. The following cases were referred to. *Hutchins v. Bassett*, (a) confirmed in the House of Lords, (b) *Harwood v. Goodright*, (c) confirmed in the House of Lords, (d) *Denny v. Barton*, (e) *Brudenell v. Boughton*, (f) *Hughes v. Turner*, (g) *Glazier v. Glazier*, (h) *Thomas v. Evans* (i)

As to the change of executors—*Atcherly v. Vernon*, (j) *Short v. Smith*, (k) *Doe d. Gibbons v. Mott*, (l) *Dupper v.*

(a) 3 Mod. 204; 1 Show. 537.

(b) Show. Parl. C. 146.

(c) 3 Wils, 501.

(d) 7 Bro. Parl. C.

(e) 2 Phil. 577.

(f) 2 Atk. 267.

(g) 4 Hag. 30.

(h) 4 Bur. 2514.

(i) 4 East.

(j) 9 Mod. 68.

(k) 4 East. 419.

(l) 2 Doug. 721.

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The Court, intimated that they would consider their judgment, and, if necessary, call on the counsel for the Rancee to argue the points. On the 18th Nov. the following judgment was delivered by—

Nov. 18th. Sir L. PEEL, C. J.—The evidence is, in effect, the same as that on which the Court founded its verdict on the trial of the issues: the letter proved by consent appears not to carry the proof further.

The principles on which our decision was founded being settled by the ultimate Court of Appeal from Indian Courts, viz. the Privy Council, cannot themselves be called in question, and we think that they were correctly applied. They are, in our judgment, quite inconsistent with the decision for which Mr. Cochrane so strongly contends. The question of intention is one of fact. The time of the destruction of the second will is unknown, it may have been coeval with or shortly prior to the preparation of the last instrument propounded, but not established as the last will of the testator. The time of the preparation of that instrument is also unknown to us, for Ramchunder's evidence we disbelieved. No instructions for its preparation were proved, and no aid of any kind in its preparation was proved. The evidence led us to think the Rajah alone, unaided, incompetent to compose such an instrument. We viewed the evidence

(a) 1 Wms. Saun. 275 6th ed.

(b) 3 Atk. 72.

(c) 4 Bur. 2514.

(d) 1 Phil. 375.

(e) 3 Phil. 27.

(f) 3 Phil. 554.

(g) 2 Add. 125.

(h) 1 Hag. 326.

(i) 3 Hag. 777.

as to *testamentary capacity* (which we did not confound with insanity) that is, of the existence of such testamentary capacity at the time of the execution of the instrument, the critical time, to be also insufficient. There were circumstances also suggestive of grave doubt as to the free exercise of such capacity as he might have had. We had no evidence other than such as the instrument itself afforded of change of intention as to adoption, of growing indifference to the perpetuation of his race by male issue, of a change of opinion on that matter so important in the mind of a Hindu; and lately so important in his eyes. When the contest in a testamentary cause turns on this point, whether the instrument expressed the free deliberate act of an alleged testator, its incongruity with his presumable intentions and with recently made dispositions of his property in accordance with those intentions, is evidence on the side of the party impeaching the will, which, though of greater or less cogency, according to the special circumstances of each case, has always been justly relied on in Courts of justice in testamentary causes as generally important in such a dispute. In addition to these defects of proof, we had evidence of an agreement between a legatee, and two of the subscribing witnesses to the will, which strongly tended to discredit the witnesses, and the instrument which they supported. We observe that in the report of the trial with which we have been furnished it is represented that the animadversions of the Court on such conduct in attesting witnesses to a will proceeded on the ground of the Court's imputed abhorrence of champerty or maintenance. This is a mistake. The Court in expressing its censure on the conduct of the attesting witnesses, meant not to found its disapprobation of such practices on the law as to champerty and maintenance. Such conduct in attesting witnesses to a will ought never to pass uncensured in a court of justice; such agreements are fraught in many

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ways with evil consequences, and are in manifest violation of their duty to the testator and to *every* legatee under the will. An agreement of this sort by the attesting witnesses with one legatee, by rendering their testimony suspected, throws discredit on the instrument, and injuriously affects the interests of other legatees. It is difficult to comprehend how any one entering into such an agreement as this now under consideration could conceive that he was acting fairly as an attesting witness by the other parties proposed to be benefited by this will. These witnesses were examined before the coroner, the agreement was afterwards entered into, and the testimony of one of them on the trial of the issues was much modified. Such subsequent testimony must necessarily be viewed with suspicion.

The will in question made no provision for the child with which the testator's wife was then *enceinte* a fact which he was proved to have known. On former occasions his testamentary papers had been carefully prepared by his confidential advisers, the preparation of this was secret and uncommunicated; viewing the whole of the facts collectively, the Court found its verdict on the sound principles established by the cases referred to in our judgment, which the spirit of the Hindu law as to improvident gifts requires not to be relaxed as to *post mortem* donations. It is, however, a complete misunderstanding of our verdict, and of the ground of its decision, to treat it, as the learned counsel treated it in his argument, as the express finding of the Court affirmatively, of testamentary incapacity, of imposition, fraud, or undue influence amounting to restraint of the will; the verdict in which we all agreed is in the nature of a verdict of 'not proven.' How, then, can we, entertaining our original opinion on the case, consistently find that at the very time of the preparation of this instrument, (for its preparation may have been co-temporaneous with or

shortly precedent to the destruction of the other) the Rajah still meant to give his wife the power of adoption given by the first will? How can we find affirmatively that the Rajah had not changed his mind on the subject of adoptions; that he constantly adhered to his first dispositions? How can we be asked to find from the mere presumed destruction at an unknown time of the second will, an intention *at that time* to revive the first, when we have knowledge of an execution in fact of a materially differing instrument, which, though it cannot in our opinion be established as the will of the Rajah, *may*, nevertheless, embody his intentions at some prior time to its actual execution, and, therefore, for any thing we know to the contrary, at the unknown time of the destruction of the second instrument. It appears to us that there is really no ground whatever in such a case as the present for inferring an intention to revive the first will.

Much stress was laid on the fact that the Rajah did not mean to die intestate. But how testate is the question? Not merely testate. The expressions on this subject in the various cases cited, when divorced from the facts of those cases, and applied to differing facts, might mislead instead of guiding a tribunal deciding on facts. A wish to die testate may be used as an argument, in favour of setting up a first will on the destruction of a second, when there is a probable ground for presuming, on the evidence, a continuation of the same general disposition; but when divorced from that additional proof, it would, if weight were attached to it, support a first will, inconsistent with a second just destroyed, and with recent instructions for a third not completed. It is, therefore, of no weight, except when conjunctively used with evidence of intention of continuing similarity of disposition. It was also urged that no new will, though containing an entire disposition with a mere change of executors, works a revocation of a former will. It cer-

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tainly does not *proprio vigore* in the life time of the testator; but if these two wills co-exist at the time of death, the latter in point of time can alone take effect as the last will, and it does then revoke the first will. Its intermediate destruction may or may not, according to circumstances, furnish evidence of an intention to revive the first will. In like manner the destruction of a will containing a manifestly contrary disposition to that contained in a former not destroyed, may or may not prove an intention to revive the first. The argument that the mere execution of a contrary will was in itself and at the moment of its execution an irrevocable revocation, has not our assent. The contrary disposition may have been engendered from causes no longer operating; with their cessation an intention to revive the first instrument may be renewed, and it may be consummated by the destruction of the intermediate instrument. The cases on the statute of frauds as to the execution and revocation of wills have no application when we are considering the will of a Hindoo testator. The decisions of the English Courts of Probate do not support the doctrine of the inefficacy of destruction of a will containing a contrary testamentary disposition, as a revocation of a revocation. If two wills continue undestroyed till the death of the testator, and the whole property is disposed of by both, or the latter contain a revocatory clause, the latter will revoke the former, whether the wills be generally similar or totally dissimilar in their dispositions, death renders the ambulating revocation consummate; but the intermediate destruction of a posterior instrument did not operate *proprio vigore* under the ecclesiastical law as a revival of the first, and that law, as established by the case of *Moore and Moore*, is here alone in question. As evidence of an intention to revive, it may be greater or less in particular cases; but it cannot even be asserted as a general rule that in all cases of general similar disposi-

tions the destruction of a second is strong evidence of an intention to revive the first; for it may be that the testator may have considered the first as mere waste paper, and may not have adverted at all to the prudence of destroying it; and it may be and often is preserved as a precedent in point of form without reference to the substance. In this case the presumption arising from the retention of the instrument in Mr. Strettell's hands is of the very feeblest kind as evidence of intention to keep that on foot as a will in the *dernier resort*, in case he destroyed its successors. A Hindu Rajah, presumably little acquainted with this legal law known to few, (in fact sane lawyers,) a weak young man at the best: sending the first document back partly altered, as instructions in fact for the preparation of a second will, and only not ordering its destruction when he had executed the second, must, according to the argument, be presumed to keep alive the first as a will on all vacancies between severally succeeding wills. With respect to the decisions on facts by other judges, we must observe that as judges deciding *a question of fact* we cannot yield to the judgment of other men, in estimating the weight of evidence. Our own consciences and our own judgments must be satisfied. We are satisfied with the grounds on which our opinion was formed on the trial of the issues, and from which we could not conscientiously depart. The evidence fails entirely of convincing us of the existence in fact of any intention to revive the first will.

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Demurrer—pleading—judgment recovered—Court of requests—jurisdiction—proclamations passed under 39 & 40 Geo. 3. c. 79.—construction of.

Counts on Promissory notes.

2nd plea. As to Co.'s Rs. 426 parcel, &c.—a decree for deft. in Court of requests for same cause of action to that extent.

3rd plea.—as to residue beyond Co.'s Rs. 426 parcel &c. that plf. impleaded deft. in Court of requests for the latter amount, and at the same time released the residue in accordance with the above proclamations and statute, and that practice of that Court.—*Held* on demurrer. That the 2nd plea contained a good and conclusive defence, and was rightly pleaded by way of estoppel. *Held also* that the 3rd plea was bad inasmuch as the last proclamation conferred no power to release the surplus, in the event of a claim exceeding Sa. Rs. 400, so as to enable a plaintiff to bring his case within the jurisdiction of the Court of requests.

DEMURRER.—The plaint contained counts on two promissory notes and the common money counts.

Second plea.—And for a further plea as to the sum of company's rupees four hundred and twenty-six parcel of the monies in the first and second counts of the said

plaint mentioned the defendant says that the plaintiff ought not to be admitted to say that the defendant is indebted to the plaintiff or that the plaintiff has any claim or cause of action against the defendant in respect of the said sum of company's rupees four hundred and

twenty-six parcel &c. because she says that before the commencement of this suit to wit on the nineteenth day of April in the year of our Lord one thousand eight

hundred and forty-seven at a certain Court of competent jurisdiction to wit the Court of Commissioners for the recovery of small debts in and for the town of Calcutta

at Fort William in Bengal then duly established by law under and by virtue of the act of Parliament in such case made and provided and under and by virtue of the

several orders and proclamations of the Governor General of the Presidency or settlement of Fort William aforesaid in Council made from time to time in pursuance

of the said act within the jurisdiction of the said Court to wit before Macleod Wylie Esq. one of the Commissioners of the said Court the plaintiff then summoned the

now defendant to appear before the said Court on Monday the twenty-sixth day of April then next ensuing to answer the now plaintiff in a certain action against the now

defendant who then was and is an inhabitant of the town of Calcutta at Fort William aforesaid and subject to the jurisdiction of the said Court for the recovery of a cer-

tain sum not exceeding sicca rupees four hundred to wit company's rupees four hundred and twenty-six parcel &c. being the very same identical causes of action in the introductory part of the plea mentioned which said causes of action were alleged by the plaintiff to have arisen within the jurisdiction of the said Court to wit at Calcutta aforesaid and the defendant further says that the defendant having appeared in pursuance of the said summons to wit on the day and year last aforesaid in and before the Court aforesaid the plaintiff impleaded the defendant in the Court aforesaid before Charles Ware Brietzcke Esquire another of the Commissioners of the said Court according to the course and practice of the said Court in the said action upon and for the said sum of company's rupees four hundred and twenty-six parcel &c. being the same identical causes of action in the said first and second counts of the said plaint mentioned as aforesaid and such proceedings were thereupon had in the said Court in the said action that afterwards to wit on the seventeenth day of May in the year aforesaid witnesses were examined in the said Court on the part of the plaintiff and of the defendant in the said action according to the course and practice of the said Court and the case was fully heard by and before the said Charles Ware Brietzcke as such Commissioner as aforesaid upon the merits and that to wit on the day and year last aforesaid and before the commencement of this suit the said action of the said plaintiff was by the judgment and consideration of the said Court according to the due course and practice of the said Court finally determined and dismissed which judgment of dismissal is still in full force and effect and not reversed or in any manner impeached and the defendant further saith that according to the course and practice of the said Court such judgment of dismissal in the said action was finally binding and conclusive between the now plaintiff and the now defendant

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and that after such judgment of dismissal no other action could according to the course and practice of the said Court be brought or continued by the plaintiffs against the defendant upon or in respect of the same causes of action or any part thereof and that the plaintiff is precluded from further litigating in respect of the same. Verification.

Third plea.—And for a further plea as to the residue of the causes of action in the said first and second counts respectively mentioned over and above the said sum of company's rupees four hundred and twenty-six parcel &c. the defendant saith that the plaintiff ought not to be admitted to say that the defendant is indebted to the plaintiff for the said residue of the said causes of action because she says that the plaintiff before the commencement of this suit to wit on the day and year in the defendant's second plea in that behalf mentioned before the Court of Commissioners in that plea mentioned in manner and form as in the said second plea in that behalf alleged sued and impleaded the defendant in the said action for the recovery of the said sum of company's rupees four hundred and twenty-six parcel &c. and such proceedings were thereupon had and such judgment given as in the said second plea in that behalf mentioned and the defendant further says that before and at the time of obtaining the said summons and commencing the said action as in the defendant's second plea in that behalf alleged to wit on the day and year last aforesaid the now plaintiff in and before the said Court of Commissioners aforesaid to wit before the said Charles Ware Brietzcke Esq. one of the Commissioners of the said Court according to the course and practice of the said Court and according to the several proclamations and orders of the Governor General of the Presidency or settlement of Fort William in Bengal made from time to time in that behalf under and by virtue of the act of Parliament in

such case made and provided agreed and was and declared himself to be willing to limit and restrict his demand in respect of the said causes of action as to the said alleged promissory notes in the said first and second counts respectively mentioned to the said sum of company's rupees four hundred and twenty-six in the said second plea mentioned being equivalent to wit to the sum of sicca rupees four hundred which said sum of sicca rupees four hundred was the highest sum in respect of which the said Court of Commissioners aforesaid then had or were entitled to jurisdiction to release and quit claim; such surplus or residue of the said last mentioned causes of action being the said identical residue in the introductory part of this plea mentioned and the plaintiff thereby then to wit on the day and year last aforesaid did release and forever quit claim unto the defendant the surplus or residue of the said causes of action as to the said two several promissory notes over and above the said sum of Company's rupees four hundred and twenty-six parcel &c. being the residue of the causes of action in the introductory part of this plea mentioned. Verification.

Demurrer to the second plea assigning for cause that the said plea furnished no answer or defence to the action and was an attempt to plead as conclusive something which only amounted at the utmost to evidence in favour of the defendant. That it did not appear by the second plea that the Court for the recovery of small debts was a Court of record or a Court whose proceedings were recorded or registered in any way or a Court whose decision was finally binding upon and not examinable by the Supreme Court nor was any reference to the proceedings thereof made by the second plea; and that the second plea ought not to have purported to be pleaded by way of estoppel; and that it was defective in form in this respect, that it commenced by way of estoppel but did not so conclude.

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Demurrer to the third plea assigning for cause. That the third plea disclosed no sufficient answer or defence whatsoever in law ; that it was novel and unprecedented ; that it was not sufficiently stated how the plaintiff released and quitted claim in respect of the said surplus or residue therein mentioned, or whether such alleged release was or how it was of such a nature as to operate by way of estoppel ; and that the Court for the recovery of small debts was not alleged to be a Court of record, nor were the alleged proceedings thereof referred to in any way, nor was it even alleged that such alleged release would appear by reference thereto or on the face thereof ; and that the third plea was defective in that it commenced by way of estoppel but did not conclude so.

Mr. *Morton* in support of the demurrers.—The judgment of a foreign Court, not of record, cannot be pleaded in bar, so as to amount to and operate as an estoppel, even in a case within its jurisdiction ; although it may be conceded (nor is the contrary contended) that the judgment of a Court, being competent as a Court, may be so pleaded.

Mr. Justice Blackstone writes (a) “a Court of record is that where the acts and judicial proceedings are enrolled on parchment for a perpetual memorial and testimony : which rolls are called the records of the Court, and are of such high and supereminent authority that their truth is not to be called into question.” Again “a Court not of record is the Court of a private man ; such are Courts baron incident to every manor. And other inferior jurisdictions, where the proceedings are not enrolled or recorded ; but their existence, as well as the truth of the matters therein contained, shall (if disputed) be tried and determined by a jury.” Now the Court of

(a) Com. 24.

requests is not a Court of record, nor are its proceedings enrolled.

There is no precedent of a plea of judgment recovered in a case where the Court, in which such judgment was obtained, was not of record. Indeed there are many dicta against the validity of such a plea. The very conclusion of the usual plea "*prout patet per recordum*" shows that the judgment should be one of a Court of record.

In Barnes v. Winkler (a) C. J. Abbott, in summing up, observed that the judgment of the Middlesex County Court was not conclusive, and that the proof of the proceedings there formed evidence for the consideration of the jury. In *Thompson v. Blackhurst* (b) it was also held that the judgment of a County Court was not conclusive, as the existence of the facts necessary to the regularity of such judgment was a question for the jury; and Mr. Justice Taunton in giving judgment observes. "A distinction in this respect has always been made between Courts of record and Courts not of record. In *Walker v. Witter* (c) which was an action brought on a judgment of a Court in Jamaica, Lord Mansfield thus expresses himself:—"the difficulty in the case had arisen from not fixing accurately what a Court of record is in the eye of the law. That description is confined properly to certain Courts in England; and their judgments cannot be controverted. Foreign Courts and Courts in England not of record have not that privilege, nor the Courts in Wales, &c. Foreign judgments are a ground of action every where, but they are examinable." *Houlditch v. Marquis of Donegal* (d) and *General Steam Navigation Company v. Guillou*. (e)

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(a) 2 C. & P. 345.

(c) 1 Doug. 1.

(b) 1 Nev. & M. 267.

(d) 8 Bligh N. S. 301.

(e) 11 M. and W. 877.

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Lastly the Court of Requests had no jurisdiction over the subject matter of this claim, which exceeded the amount recoverable in that Court. For there is nothing in the last proclamations which entitles a plaintiff to waive the surplus of his claim, and sue there for the remainder.

Mr. *Ritchie* in support of the pleas.—As to the first, the decision of a Court having jurisdiction to entertain the subject matter of the suit, is a complete bar to any proceeding in any other Court for the same matter, provided the decision is of such a nature as to be binding, according to the rules of the Court that pronounced it, and sufficient to preclude any other action from being instituted in that Court for the same cause.

For this purpose it is immaterial, whether the original Court was a superior or an inferior one: whether a Court of record or the reverse; provided it had complete jurisdiction over the subject matter. On this principle, judgments of foreign Courts (although not of record) have been held conclusive and unexaminable, if properly pleaded, and if final in the countries where they were pronounced. *Ricardo v. Garcias* (a) and the cases there cited. *General Steam Navigation Company v. Guillou*, (b) *Callander v. Dettriech* (c) *Henderson v. Henderson* (d) So also the sentences of General Courts Martial (*Rex. v. Saddis*(e)) of the visitor of a College (*Phillips v. Bury* (f)) of an inferior English Court (*Behrens v. Paoli* (g)) and of arbitrators *Edwardes v. Gascoigne* (h) (if final in their nature) amount, (when properly pleaded as such) to estoppel, as between the same parties, on the ground, that those tribunals respectively have jurisdiction over the subject matter decided on by them. The principle

(a) 9 Jur. 1019, 12 Cl. & Fin.

(b) 11 M. & W. 877.

(c) 4 M. & Gr. 68.

(d) 13 L. J. 274 Q. B.

(e) 1 East. 306.

(f) 2 T. R. 346.

(g) 1 Keen, 457.

(h) 1 Y. & J. 19.

applies more forcibly in the particular instance, where the litigating parties are the same both in the inferior and superior Courts, and the subject matter in dispute identical: and where the plaintiff has chosen his tribunal; has himself voluntarily invited the jurisdiction of the inferior Court, and taken his chance of success there. He cannot now be permitted to dispute the validity of the decision passed. *Philips v. Hunter*, (a) *Read v. Pope*, (b) *Pitt v. Knights*, (c) the *Duchess of Kingston's case* in Smith's leading cases were also cited.

The third plea may be supported upon similar principles. The Court of Requests has jurisdiction to entertain a suit involving a larger amount than Sicca Rupees 400, provided the plaintiff in the first instance, consented to release the surplus above that sum. Although the second and third proclamations of the Governor General, made under the 39th and 40th Geo. 3d sec. 79, and extending the jurisdiction first to Sicca Rupees 250 and subsequently to Sicca Rupees 400 do not contain a clause similar to the first proclamation of 1802, expressly enabling a plaintiff to release the surplus of his claim, and thus to reduce it within the limits of the Petty Court jurisdiction, yet the power is impliedly conferred, inasmuch as it is directed that that Court should exercise all powers and authorities theretofore granted to it in respect of any claim up to Sicca Rupees 400, in as full and ample a manner as they existed in respect of claims within the lower limit. If the last proclamation confers such a power, and gives jurisdiction in such cases, then, although no actual release was executed by the plaintiff in the Court of Requests, yet the very fact of his being suffered to enter upon his case in that tribunal, after declaring his willingness to release the surplus, would operate *at law* as a release, and could bar him from

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(a) 2 H. Bl. 410.

(b) 1 C. M. & R. 302.

(c) 1 Wms. Saun. 91 (*Note a*)
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afterwards instituting any proceedings for the surplus. But even if the proclamation cannot be construed as conferring any such power, and if the Court of Requests had no jurisdiction to entertain a case in which the original claim exceeded Sicca Rupees 400, even where the plaintiff released the surplus; still, the plaintiff, having in the former suit asserted the jurisdiction of the Court against the defendant, and having voluntarily given the release which that Court required as a condition precedent to their hearing him or entertaining his suit, is estopped from saying that that Court had no jurisdiction, and is equally bound by the release as if the Court had had jurisdiction for an amount equivalent to Sicca Rupees 400. There was a good consideration which, though not under the seal of the plaintiff, would support the release, viz. that the defendant had, by reason of the plaintiff's declared willingness to release the surplus, waived the objection which otherwise would have been urged, to the jurisdiction of the inferior Court. It is clear that if the plaintiff had recovered in the inferior Court to the extent of Sicca Rupees 400, he could never have recovered the surplus either in that or this Court; and if so, on what principle can he be permitted, after taking his chance of success in that Court, to say, because he has failed, that he is entitled to be absolved from the condition upon which alone he had obtained a hearing and decree?

SIR L. PEEL, C. J. The case is important, but as we entertain no doubt upon it, we shall not reserve our decision. The question on the plea first demurred to, is this, whether a party suing in the Court of Requests on a matter within its jurisdiction, and, failing there on the merits, can agitate the same matter again in this Court, by a fresh suit. I was certainly surprized to hear it argued that the decision of that Court was not conclusive; whatever doubts may have existed as to the

conclusiveness of the judgments of foreign Courts, I have always considered that since the case of *Hunter v. Phillips* it had never been doubted that the judgment of a Court of concurrent jurisdiction, though not of record, expressly on the point between the same parties directly put in issue, was conclusive, even in the highest Court of Westminster Hall. The decision in *Moses v. Macfarlane*, (a) made, on circumstances special and peculiar, a slight inroad on the general doctrine, which was fully asserted in the case of *Hunter v. Phillips*: and is expressly stated again, with the concurrence of all the Judges in the celebrated judgment of C. J. De Grey in *the Duchess of Kingston's* case.

He speaks of Courts of concurrent jurisdiction, without any limitation as to Courts of record. The case of *Ricardo v. Garcia* settles the law the same way as to the general conclusiveness of foreign judgments and decrees conclusive in their nature; the sole question, therefore, is whether the defendant may, by plea of estoppel, put an end to the litigation. I shall not stay to inquire whether he might not do so more summarily, and still sooner. If the matter can be pleaded in *bar* at all, I am at a loss to understand how it can be pleaded otherwise than by way of estoppel, for the defence neither denies any facts, nor confesses and avoids any facts; but the defendant says, let him not be admitted to say I promised so and so, when a Court of competent jurisdiction has said that I did not. It is, as it appears to me, in its nature matter of estoppel, and the objection raised is technical, that estoppel must be by matter of record, by deed, or by matter in pais. Definitions, however, are not always sufficiently comprehensive. It was considered by the Court of Queen's Bench, in the case referred to, on the argument that the decision of a foreign Court might

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(a) 2 Burr. 1012.

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be pleaded as an estoppel; and they would scarcely have suggested that, unless they had thought the circumstance unessential that the decision should be that of a Court of record. It has been decided also that estoppels in pais may be pleaded as estoppels, and on principle we see no distinction between the two. And since, if not pleadable as an estoppel, it would clearly operate as an estoppel on the evidence, convenience is in favour of its being relied on at the earlier stage. Therefore, although no express *decision* can be found, we do not hesitate to decide that the defence is pleadable as it is here pleaded.

The demurrer to the other plea must, we think, be allowed. It is unnecessary for us to say whether it was essential so to plead. The facts stated, and on which the plea proceeds, are, in substance, that the demand was entire, and the excess *released*, under the statute, the proclamation, and the practice of the Court. It is sufficient to say that neither the proclamation nor the statute sanction any such practice. Whether it exist or not, we know not: on these pleadings it must be assumed to exist. The statute imposes as a limit 400 sicca rupees. The last proclamation raises the jurisdiction of the Court to that amount. But it is silent entirely on the subject of permitting a plaintiff to release the surplus, if the demand in fact exceed 400 rupees: and the general words of reference in the proclamation cannot, we think, be construed as showing that the Governor General meant to confer this jurisdiction; and the statute in fact does not empower him to confer it. Therefore the reference in the plea to the proclamation and the statute as the legal foundations of the practice fails: and as the release is put only on that foundation it fails with it. The jurisdiction of the Court of Requests, embraces persons whom the jurisdiction of this Court might not reach. If such an one were indebted on one demand above 400 sicca rupees he would be

liable to the jurisdiction of neither Court, and the plaintiff, if he might release a surplus, to found a jurisdiction in the Court of Requests, might, in certain cases, enable the Court to give itself a jurisdiction over persons subject to no Court of civil jurisdiction within Calcutta. When such a power is meant to be conferred, it is expressly conferred. Otherwise the jurisdiction follows the real extent of the demand.

Demurrer to 1st plea overruled :—
to 2nd allowed.

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STOWELL *v.* HOLMES, and others.

DEMURRER for want of parties to a bill of discovery and for relief as incidental thereto. The bill stated that some time in the year 1828 a joint stock company was formed in Calcutta, under the name and style of the Union Insurance Company, for the purpose of carrying on, in Calcutta, the business of river insurance upon goods and merchandise; and that certain persons (of whom the defendants were *some*) carried on the business of the company under that name: that the defendants were members of the company; Holmes being secretary and chief manager. It was stated further that the complainant, having been in the habit of insuring with the company, caused, in May 1846, certain policies to be effected in writing, signed by the defendant Holmes as secretary, and by some *two or more* of the then defendants acting as committee or be made parties.—The bill prayed an account and relief against the whole Company.

Held on demurrer—that in order to bind the Company, some person, representing shareholders not interested, as *signing* Directors should have been before the Court.

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1848.
January 10.
Monday.

*Pleading—demurrer
want of parties
partnership—joint
stock Company.*

A bill was filed by a partner in an Insurance Company, to recover sums insured on two policies, against the secretary and others members. It was alleged, that the secretary and some "two or more" of the other defendants had acted, and signed the policies as Committee men or Directors, on behalf of themselves and the other members:—that the shares amounted to 100; and were transferable:—and that without great inconvenience, all the members could not

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directors, on behalf of themselves and the other members. The goods insured were lost, and an action at law was commenced by the complainant against the defendants, who pleaded the partnership of the complainant with the company. The plea being true in fact, was submitted to; and the present suit instituted.

The bill charged that the capital, stock, property, and profits of the company had been divided and apportioned into 100 shares and upwards, which were held by the defendants and other members of the company in different proportions among themselves, and were transferable under certain restrictions; and that the members and shareholders amounted to more than 50 persons; that the concern was so liable to change and fluctuation, arising from the transfer of the shares, and from deaths of members and shareholders, that it became impracticable, without the greatest inconvenience, to make them all parties. The prayer was to the following effect "that the Union Insurance Company, and the several members and shareholders thereof, might be decreed to pay the sums insured by the several policies; that an account might be taken of all monies due and owing to the complainant from the company and its members and shareholders under the policies; and the balance due be paid by them."

The defendants demurred, on the ground that it appeared by the bill that there were partners and shareholders in the joint stock company and partnership other than the defendants (not charged therein or thereby to be persons not subject to the jurisdiction,) who were necessary parties, inasmuch as relief was prayed against the whole body of the partners and shareholders of the Company, and the bill was not stated to be filed on behalf, or with the consent of such parties who were not joined as complainants, or that the latter refused to join.

Mr. *Dickens* and Mr. *Ritchie* in support of the demur-

rer.—This bill is not filed simply against the officers of the company, or the parties signing the policies, but a selection is made of certain members only ; and at the same time a general account is prayed for against the whole company. The fact of fluctuation by transfer of shares cannot affect the question ; for those who were shareholders at the time still continue to be liable. The number of shareholders in the present instance is not numerous. The only inconvenience which would arise, is that those who were originally sued, would have in their turn to sue for contribution.

[*The Chief Justice.* The bill states that the shareholders amount to 50 in number, and that the shares are transferable, suppose all these persons dispersed in different and distant places, and transfers to take place, the partners might become innumerable and difficulties arise.]

If any inconvenience is threatened by the fact of there being numerous shareholders, the bill should have been so framed as to have manifested an existing inconvenience. Then the defendants do not represent the whole body of shareholders. The prayer is directed against the company, without any allegation in the bill to the effect, that the defendants on record have, in any way, power to control the acts of the company.

[*The Chief Justice.*—The principle is, that when enough are joined to represent the interest of all, execution would affect all.]

The objection here is that all are not represented. The bill states the policy to have been signed by the Secretary and two or more others of the partners :—this shows that there may have been a diversity of interest between such as actually did sign the policies, and such as did not. If so, some, or all of both classes should have been joined ; or otherwise, the whole interest would not be represented. One or more *non-signing* directors should have been joined, in order that the interest of the whole

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company might be fairly represented, they cited *Hills v. Nash*, (a) *Walworth v. Holt*, (b) *Richardson v. Larpent*, (c) *Deeks v. Stanhope*, (d) *Barber v. Walters*, (e) and *Richardson v. Hastings*. (f)

Mr. Colvile A. G. and Mr. Sandes in support of the Bill.

[*The Chief Justice*.—Confine yourself to the last point, as to whether a non-signing director should not have been joined.]

There is nothing to show, from the tenor of the bill, that that is not actually the case, and although no express allegation is inserted to that effect, yet a strong inference may be drawn that the absent members are represented. The statement is “that the policies were signed by the Secretary and by some two or more,” it appears, then, that some signed one policy, and some another, so that there may be a defendant on this record who did not sign these particular policies; if so, that class is represented. *Adair v. the New River Company*. (g) If the number of defendants selected from the company has been arbitrarily so selected, that might have been remedied by a motion to the Court, supported by affidavit, *Lund v. Blanshard* (h) as between the parties to this record the loss if any would fall ultimately on the whole company, *Taylor v. Salmon*. (i)

SIR L. PEEL, C. J. delivered judgment.—It appears to us that if a selection had been made from the general body of shareholders, not acting as members of the managing body, the principle of representation would apply.

(a) 1 Phillips 594.

(e) 8 Bea. 92; 14 Law. J. Ch.

(b) 4 Myl. & Cr. 619; 10 Law. 37.

J. Ch. 138.

(f) 7 Bea. 301-303; 13 Law.

(c) 2 Y. & C. (n. c.) 507.

J. Ch. 129.

(d) 14 Sim. 59; 13 Law. J.

(g) 11 Ves.

Ch. 453.

(h) 4 Hare 290.

(i) Myl. & C. 412.

That principle is just and expedient, and intended to relieve parties from failure of justice. But according to the principle laid down in *Richardson v. Larpent*, there must be reasonable ground for supposing that the interests of all parties are fairly represented. That was a case of a very numerous unincorporated trading company, between the members of which there was a schism, one division taking one view of certain important proceedings relating to their common interest, the other taking a different view, and each division comprehending, as it appeared, such a number of persons as to render it substantially impracticable to conduct a suit comprising all the individuals of either class. The bill was filed by the plaintiffs on behalf of themselves and all other the members of the partnership; with respect to the defendants, none of those dissenting from the view of the plaintiffs were present in that character, and Vice Chancellor Knight Bruce there says "It is true that some are present, but all present are directors or trustees—persons to whom more or less are committed the government and administration of the company. They are all, therefore, directors or trustees for all, and, sustaining that character, cannot, it may fairly be supposed, exercise so fully and freely the right and power of opposing the plaintiff's views, as those persons may be considered likely to be capable of doing, who owe no duty to the plaintiffs, beyond the simple and ordinary duty of partners."—"I do not say that all the parties dissentient should be here; but there ought to be a sufficient number to discuss the present questions freely and unrestrainedly; or at all events with more freedom and propriety than they can be discussed by the defendants now on the record." The contract here is stated to be that of the entire company. The constitution of the deed under which this company was formed might have been acted on or not. If the former, the contract under the deed would appear the contract of the

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company. If the latter, still the contract might be binding, through acquiescence, and other circumstances. These are questions of nicety and difficulty. The parties signing would nevertheless be liable, although the company might not. We should depart from the general principles establishing the doctrine of representation if we allowed the suit to proceed without bringing before the Court some person representing shareholders not interested, as signing directors.

Demurrer allowed.

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BAMUN DOSS MOOKERJEE v. OOMESCHUNDER ROY.

*Bill & cross-bill
pleading—contract
in fieri—illegality
and revocation of—*

Bill to enforce an agreement — cross bill, praying that the agreement might be cancelled as having been fraudulently obtained; and, also, that certain half-notes, deposited as security in respect thereof, might for the like reason be delivered up. *Held* on demurrer, that the subject matter of the bill and cross bill was identical, as the prayer referring to the restoration of the half notes might be rejected as surplusage:—that although the contract appeared to be illegal, still as it was in fieri it might be recalled and a party be relieved against it and the half notes be recoverable at law.

DEMURRER to cross bill—praying that a certain agreement therein mentioned might be declared annulled and cancelled as having been obtained by the defendant in the cross suit by fraud and without any consideration; —and also that certain half notes, which had been deposited by the complainant with the defendant for the purposes of the agreement, might be declared to have been obtained fraudulently and be now restored. The cross bill stated that in September 1844 one Tarranee Dabee (a purdah woman and widow of Chundermohun Mookerjee a Hindu zemindar, deceased) had instituted a suit against the present complainant and others in the principal Sudder Ameen's court in the zillah of Nuddea. The present complainant had also instituted a suit in a Mofussil Court against the defendant, in which he succeeded in obtaining a decree against the latter. Shortly afterwards the defendant, who had been actively engaged in maintaining and prosecuting the suit on behalf of Tarranee Dabee, and represented himself as her manager, made proposals to the complainant, though one Bissonath Day, for a settlement

of the matters in dispute in that suit. An interview accordingly took place between the complainant and defendant for that purpose, in the month of February 1845, at Hooghly, when the latter, (representing himself to have full authority from Tarranee to settle and compromise her suit, which he stated himself to have been mainly instrumental in getting up, and which representation, it was alleged, had been subsequently discovered to be false and fraudulent,) offered to procure a settlement of Tarranee's suit, provided the complainant would put off the execution of the decree obtained by him against the defendant, and make the latter some compensation as well. The complainant then stated his willingness to have the suit settled upon the terms of the will of Tarranee's late husband: the matter was eventually referred to Bissonath Day, as arbitrator and referee, who decided that Rs. 200 should be paid by complainant to Tarranee and Rs. 15,000 to the defendant, as compensation. The latter, however, subsequent to the above decision by Bissonath, affirmed that he had advanced a sum of Rs. 8,800 on account of the expenses and maintenance of Tarranee and her lawsuit, and insisted on being reimbursed to that extent, *ultra* the Rs. 15,000. It was ultimately agreed, that that sum should be deposited by the complainant with a third party in Calcutta, and that, after the settlement of the suit, the Rs. 15,000 should be paid over to the defendant, in addition to the Rs. 8,800, which were to be repaid by the complainant to the defendant. The latter however afterwards representing that this mode of deposit would cause delay in the settlement of the suit, the complainant consented to deposit half notes for the amount of Rs. 15,000 with the defendant; and they were handed over to him accordingly. The original bill of complaint was afterwards filed against the present complainant (Bamun Doss) for the remaining half notes, stating (falsely, as was alleged in the cross bill,) that the agreement was

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executed, and that the Rs. 15,000 were given with the consent of Tarranee, in consideration of his withdrawing from the conduct of her suit. The cross bill also stated that the present complainant had since discovered that the defendant had no such authority or power as represented by him : but that, on the contrary, no settlement whatever had been made in the suit by Tarranee, which was still being prosecuted. Demurrer—showing for causes (inter alia) that the bill on the face of it alleged an agreement (and a payment or delivery thereunder of halves of promissory notes payable to bearer) in itself illegal, immoral, and fraudulent, and calculated to injure third parties :—that the complainant in the cross bill, by his own showing, was an equally fraudulent wrong doer with the defendant; also—that the plaintiff's remedy was by action of trover.

Mr. *Dickens* and Mr. *Morton*—in support of the demurrer. If any equity is disclosed by this cross bill, it is that of a transaction illegal and fraudulent in itself, being founded on an agreement with the manager of a suit for a settlement of it without authority, and without the knowledge or concurrence of the principal. It is manifest Tarranee had no notice of her manager's proceedings—proceedings inconsistent with his duty, and calculated to injure her, and beneficial only to himself; in fact, there is no ground at all for the interference of a Court of equity. The proper remedy for the recovery of the half notes deposited would be by an action of trover.

Further—the parties in this instance, both complainant and defendant, are in *pari delicto*; where that is the case the Courts will not interfere for the protection of either. Lastly, a cross bill should consist merely of matter of defence; that is not so here, for this bill states a new contract, setting out and alleging an agreement to be illegal, and praying specific *legal*, instead of *equitable*

relief. This makes it an original bill, and as such open to demurrer.

Mr. *Prinsep* and Mr. *Ritchie*—in support of the cross bill. A legal demand may be set up in a cross bill against the equity in the original; and although an agreement may prove to be illegal, still relief will be granted when the parties are not in *pari delicto*. *Osborne v. Williams (a)*. Now in the present instance it is by no means clear that the complainant is in fault at all: the statement to that effect goes to no greater extent than that the complainant was willing to abide by the will of Tarranee Dabee's husband; and the agreement only stipulated that the mook-tear should be paid his costs and expenses in the first instance, leaving Tarranee's rights to be settled afterwards by an umpire to be appointed by both parties for that purpose, who did, in fact, award according to the terms of the will. Further, the now complainant comes to the Court, not to enforce, but to annul and rescind this agreement, as having been obtained under false pretences, he having negotiated with a person whom he erroneously supposed, at the time of entering into the agreement, to have had ample power and authority to compromise the suit. The remuneration to him was not for the compromise, but for his previous labors in the suit. Further, it appears that nothing has been done under the agreement, nor has it in any way been carried out, the parties have therefore a *locus penitentiae*, and the contract, though illegal, may be rescinded or recalled. The now complainant is, therefore, in the same position as if the half notes had been deposited in the hands of a stake holder. *Hastilow v. Jackson (b)* The mere fact of the now defendant having obtained possession of the half notes *fraudulently* can make no difference in this respect, for

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(a) 18 Ves. 379.

(b) 8 B. & C. 221.

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he will not be allowed to take advantage of his own wrong *Thomas v. Edwardes (a)*. A cross bill requires no equity to support it, where it is intended as a defence to the original bill, and bears reference to the same subject matter. The relief asked by the cross bill is here precisely analogous to that prayed by the original bill.

SIR L. PEEL, C. J. The demurrer must be overruled with costs. The subject matter of the original, is identical with that of the cross bill, except so much of the prayer of the latter as relates to the restoration of the half notes, and that portion may be treated as surplusage: the objection, that there is a remedy at law, is of no weight; besides it is in consequence of the filing of the original bill itself, that the now complainant is brought into a Court of equity; the effect of which original bill he now seeks to defeat. The contract set out appears to be illegal, inasmuch as payment is thereby awarded to the mooktear by way of compensation beyond his costs. The defence of illegality may be available at law, but the contract is still *in fieri*, and the moral turpitude not complete, there is, therefore, a *locus penitentiae*, and the party may be relieved from the performance of it; and as the notes are in substitution of, and quasi money, they may be recovered back at law, the defendant being in the position of a stake holder.

Demurrer overruled.

(a) 2 M. & W. 215.

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January 13.

FAGAN v. THE BANK OF BENGAL.

TROVER for Company's paper, amounting in the aggregate to Co.'s Rs. 14,000. Pleas—not guilty, and not possessed. The circumstances of this case very strongly resembled those in that of *Macleod v. the Bank of Bengal*. (a) At the trial the following facts appeared. The plaintiff, in November 1841, while a constituent of the firm of Macleod, Fagan, and Co. (of which A. D. Macleod and C. Fagan were the partners) drew (without advice) a draft on the firm for Rs. 6,000 at ten days sight, and thereby considerably overdrew his account. The firm had, in consequence, written to him a letter of remonstrance, and requested him to make arrangements for placing them in funds, with a view to meet the draft at maturity. The plaintiff then wrote, enclosing a *hoondie* for Co.'s Rs. 2,000, and desired the firm to meet the balance, by selling out the government paper lately sent to them by him, to the amount of Co.'s Rs. 4,300 which he considered as available funds. In answer to this, Macleod, Fagan, and Co. wrote to say that they had no authority to sell the government paper referred to, and enclosed a power of attorney, suggesting its execution by the plaintiff, so as to enable the firm to sell out and reimburse themselves as the plaintiff had requested. Upon the return of the power duly signed, Macleod, Fagan and Co. first sold and transferred the Company's paper to themselves, and then pledged it with the Bank to raise the money required.

The power was precisely similar to that in *Macleod v. the Bank of Bengal* and authorised "A. D. Macleod and C. Fagan, partners in the firm of Macleod, Fagan and Co. jointly or severally to sell, *endorse, and assign*, or to

Power of Attorney construction of principal and agent recognition of acts.

M. F. & Co. were agents of plaintiff who (being indebted to them) transmitted, at their request, a power of Attorney authorizing them to sell *endorse and assign* certain Company's paper of plaintiff, in their hands. On receipt of the power M. F. & Co. first sold to themselves, and then pledged the securities with the Bank. Shortly afterwards, M. F. & Co. failed: their schedule showed a balance in favor of plaintiff who, without objection to the acts of M. F. & Co. received two dividends as a creditor, upon the amount.

Held, first, that, as the evidence did not show a sale in fact by M. F. & Co. to themselves, such alleged sale must be treated as imaginary and that M. F. & Co. when they pledged to the Bank, were acting under the power, which gave no authority to *pledge*; secondly that as there was no proof of the plaintiff's knowledge of the real state of circumstances attending the alleged sale, there was no recognition on his part of the acts of M. F. & Co.

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receive payment, &c." The mode of endorsement, and the conduct of the Bank in calling for information, and their inspection of the power, prior to making the requisite advances, were also the same as in the former case. The government papers at the time of the grant of the loan, were deposited with the Bank, who subsequently sold them. Shortly after this the firm of Macleod, Fagan, and Co. failed; their schedule showed a balance in favor of the plaintiff, which, but for the sale and pledge of the government paper in question, would have proved considerably against him. Subsequently also to the failure, the plaintiff communicated with Mr. O'Dowda, the assignee of the insolvent, requesting information as to whether any dividend was likely to be declared in respect of his claim against the firm. On receiving the requisite information from the assignee, the plaintiff made no objection to the mode in which Macleod, Fagan, and Co. had dealt with the securities in question, but actually received two dividends as a creditor upon the amount carried to his credit through the sale of the notes.

For the defendant it was contended at the trial, that these additional circumstances substantially varied the present case from that of *Macleod v. the Bank of Bengal*: and that the subsequent conduct of the plaintiff clearly amounted to a recognition of the acts of Macleod, Fagan, and Co. It was urged, in reply, that the correspondence between the plaintiff and Macleod, Fagan, and Co. showed that a power to *pledge* was never contemplated: the authority intended to be, and which was actually conferred by the power, was an authority to *sell*: as to receiving dividends from the assignee—that could not possibly amount to a recognition, unless with full knowledge. The information received by the plaintiff from the assignee was that the paper had been actually *sold* under the power: this in fact misled the plaintiff, and induced him to suppose that he was reduced to the condition of any other creditor.

The Chief Justice—in delivering the verdict of the Court, observed. If it had been made out, that the plaintiff, with full knowledge, had received the dividends subsequent to the insolvency, it certainly would have been strong evidence to show that the power was intended to give much more ample authority. As the case at present stands, it appears that the power sent, conferred simply an authority to *sell*; the intention of the plaintiff being to put Macleod, Fagan, and Co. in funds to meet the advances made. The power contains no authority to *pledge*. A verdict was found for the plaintiff for the full amount with liberty to the defendant to move.

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The amount and value of the paper had been settled by admissions, but interest was also claimed; and it was suggested by the learned counsel for the plaintiff that, under Act XV. of 1841, Sec. 12, damages might in this form of action be given in the nature of interest over and above the value of the paper at the time of the conversion. The Court reserved the point, giving the plaintiff leave to move. Rules nisi were accordingly obtained on the above grounds by the parties respectively.

Mr. *Morton* and Mr. *Ritchie* were for the plaintiff.

Mr. *Prinsep*, Mr. *Dickens* and Mr. *Sandes* for the Bank. The following judgment embraces all the points urged by the learned counsel, so as to render it unnecessary to recapitulate them here.

SIR, L. PEEL, C. J. This case is, in our opinion, undistinguishable in principle from that of *Macleod v. the Bank of Bengal*. Both are founded on authorities which, if they are not to be followed, must be overruled by a higher tribunal than this Court. The grounds upon which it is sought to distinguish the present case appear to us to be untenable. We think there was no

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recognition. The evidence does not show a sale, in fact, by Macleod, Fagan, and Co. to themselves, supposing such a sale to have been legally valid. We view this sale as a mere fiction. It is ingeniously introduced to support an argument which would otherwise rest on no foundation. The evidence shows that the plaintiff was subsequently informed of a sale, but it does not show that he knew the real circumstances, and there is no evidence of any sale, except that by the Bank of Bengal, which is not the sale which the argument treats as recognized; but an imaginary sale by Macleod, Fagan, and Co. from the plaintiff to themselves is the subject of the supposed recognition. It is said that Macleod, Fagan and Co. had a lien, and that they transferred that lien to the Bank of Bengal. Macleod, Fagan, and Co. undoubtedly had a lien, but if the nature of it be considered, the consequence to the plaintiff's success in this action, which it is sought to deduce, will not follow. The Bank of Bengal sold these securities. This act could be supported under the power of attorney alone: for the paper was specially indorsed to the plaintiff, and has been by him unindorsed unless the power has been executed. If bills of exchange are drawn payable to the order of A. and A. pays them into his banker's hands without indorsing them, it is obvious, that though A. may become subsequently indebted to his banker, and his banker may have a lien on those bills, that this lien does not operate to transfer a property in such bills, and is only an equitable lien. The debts which they secure and evidence are transferable by the custom of merchants, but transferable by custom in such a case by indorsement only, not by delivery without indorsement, the bills not being in a state that the property in them can pass by delivery. The case of *Collins v. Morton (a)* will, (if at-

(a) 1 Bos. & Pul.

tentively examined,) show that it is the nature of the property in bills which enlarges the power of alienation over that which exists as to mere chattels. Therefore, without an indorsement, no such property in these specially indorsed securities could be transferred to the Bank, so as to prevent their sale from operating as a conversion, and by a conversion their lien would, for any defensive purposes in this action, be destroyed. The question is, therefore, simply this, was the power exercised or abused? We think upon the evidence that it was grossly abused. If such an exercise of a power could be supported, then a lien might be enlarged to the prejudice of the owner, by the fraud of the agent. It is therefore in our opinion clear that the Bank of Bengal could not be in a better position than Macleod, Fagan and Co. against the plaintiff. They, (Macleod, Fagan and Co.,) could sell the plaintiff's paper, and confer property on it if they followed the authority conferred; that authority, if the correspondence and the power be looked at, was not to pledge the paper, still less to pledge it to another for their own advantage. The sale by the bank was unauthorized since the pledge to the bank was an unauthorized pledge. The contract between the Bank of Bengal and Macleod, Fagan and Co. was not a contract that the latter should transfer the lien, but it was a totally different contract: and it cannot be viewed now otherwise, because it is found to be unsupportable as it really was. What ground there is for assuming a sale by Macleod, Fagan and Co. to themselves is best tested by this, whether on this evidence, if they had retained the paper, and it had risen in value, and the plaintiff tendering to them the amount of their advances, had obtained his paper back, they could have said "look at these indorsements made by us as your attorneys; the property is ours, we have sold to ourselves, and we will take advantage of the rise in the value." The plaintiff is, in our opinion, entitled to retain his verdict. It is not in discussion under this rule, whether the verdict

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should stand for the full amount of the damages, or for that sum as reduced by the amount of Macleod, Fagan and Co's. lien against the plaintiff. The defendant has not availed himself of the leave offered him at the trial to move to reduce the damages, as we understand because that reduction might prejudice his right of appeal. Upon that point, therefore, we express no opinion. If this case be appealed, and our decision be sustained on the main question, then if the defendant is entitled *at law* to a reduction of the damages to the extent of the lien of Macleod, Fagan and Co. against the plaintiff, the evidence furnishes the means of making that reduction; if the verdict be not questioned now on this point it can be appealed against on that ground. The plaintiff if he be legally entitled to retain his full damages, is certainly a trustee for the surplus; but whether for the Bank of Bengal or for the creditors of Macleod, Fagan and Co. it is not necessary for us to decide. A mere equitable lien could not, we apprehend, furnish ground for a reduction of damages in an action at law: and whether the lien of Macleod, Fagan and Co. be treated as merely a common law lien on a chattel, or as a lien on a negotiable instrument needing indorsement, and unindorsed, still the lien of the Bank would be but equitable if the power of attorney was not duly exercised. A lien on a mere chattel is not at common law transferable, *Legg v. Evans. (a)* and as the case is not within the Factors Act, it would be erroneous in our opinion to hold that if the papers were viewed merely as a chattel, the Bank of Bengal had any *legal* lien against the plaintiff under the circumstances of this case, and that the transfer, for a valuable consideration, of an unindorsed bill or note payable to order confers only an equitable right. *Watkins v. Maule (b)*.

Rule discharged.

(a) 6 M. & W. 42.

(b) 2 Jac. & W. 243.

The rule as to the claim of damages in the nature of interest over and above the value of the Company's paper at the time of the conversion in this form of action under Act 16 of 1841, Sec. 12, was also argued and judgment to the following effect was given by

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SIR L. PEEL, C. J. This is an action of trover against a wrong doer, and the simple question is, what was the value of the property at the time of the conversion. The value was settled at the trial by mutual agreement, and by opening that again and adding something more, of which we have not sufficient particulars before us, we do not feel assured whether we should be doing injustice or not. The simple rule is to find the value of the thing at the time of conversion, and as, in this instance, there has been but one conversion, we cannot increase the damages. The act is intended to apply to goods only, not to negotiable instruments, and this intentionally. Besides this is a case in which it would not apply: the Bank, though in reality liable, is an innocent party, there being no fraud on their part.

Rule discharged.

*In Equity.*FABIAN *v.* WALTER.

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Jan. 26.

Wednesday.

IN this suit, a decree had been obtained against the defendant Walter, by which, inter alia, certain costs were awarded against him.

Walter had absconded, and a writ of sequestration had been issued directing the sheriff to seize his lands and goods, under which some houses had accordingly been seized.

Motion that the sheriff be directed to sell certain sequestered property consisting of houses, and pay proceeds in satisfaction of certain costs awarded against the owner.

Held (in accordance with the practice in England) that real estate could not be sold under writ of sequestration,

Mr. Morton now moved, on notice, that the sheriff be

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directed to sell the houses sequestered, and to pay over the proceeds in satisfaction of the costs.

Mr. *Montriou* opposed the motion. This is an experiment, and only to be accounted for from the circumstance of two similar orders having passed *sub silentio* and without argument, as reported by Mr. Fulton, p. 215. Those were both Hindu cases—in both, the Court granted an order nisi, that the question might be argued, but it never was argued. Mr. Justice Grant drew the distinction that the land of Hindus might be treated as personalty. It is not necessary now to dispute the correctness of those decisions. Here the writ is not against a Hindu or Mahomedan : that distinction therefore does not apply.

The writ of sequestration is an anomalous and peculiar remedy, resting for its validity upon its antiquity, and the prescriptive right apparently possessed by the Court of Chancery to regulate and modify its own process and powers.

The history and nature of the writ is shown in the cases cited by Mr. Swanston in a note to *Francklyn v. Colquhoun*. (a) Where sequestration is a final and not mesne process merely, it is usual to grant the sequestrators leave to set and let the lands—but there is no case, precedent, or dictum in favor of a sale of lands ; and the reason is given by Lord Thurlow on refusing an order to sell houses taken under sequestration issued for want of an answer. *Shaw v. Wright*. (b) He observed : “ The order would do you no good. I should not have much difficulty in selling, not only perishable commodities, but, if the sequestrators were in possession, of rents paid in kind, or the natural produce of a farm ; but how shall I make a title ? By whom ? I cannot well order the sequestrators

(a) 3 Lev. 276.

(b) 3 Ves. 22.

to sell, without at the same time warranting the title : then I do not know how I can do that. It does not transfer the term to the sequestrators. It is only a process to compel an appearance, the performance of a duty. All profits I will direct them to apply. The difficulty is this, if the sequestrators sell, and the purchasers should be brought before this Court to complete their contracts, I could not compel them to pay the money. I cannot make a man take a title, which he is to support by a bill for an injunction. You will not find any instance of an order to sell under a sequestration a subject, which passes by title and not by delivery.” The affidavit also contains statements of adverse title, and therefore, under any circumstances, the only order which the Court can make, would be a reference to examine the claimant *pro interesse suo* : but the legal objections are relied on.

Mr. *Morton* in support of the motion—With respect to the adverse title, that is not available by the defendant—the claimant must himself come in and move. As to the other objections raised ; the cases cited from Mr. *Fulton*’s reports were authorities in favour of the practice of this Court to sell land under a sequestration in equity. Since *Fergusson*’s act, it was difficult to hold that there was any substantial distinction between land in the possession of Hindus or of British subjects. With respect to the difficulty of giving a title, there could certainly be no such distinction. There is no instance, where the Court ever warranted titles. The same objection would apply to a sale under a *venditioni exponas*. The purchaser takes the title *quantum valeat*. Then, there is a material distinction in the practice here, where the sheriff, and not strangers, has the execution of the writ. He executes it as he does other process of the Court ; and there is no greater inconvenience in his selling “ the right, title, and interest ” under this writ, than under any other.

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 WALTER.

SIR L. PEEL, C. J. This motion clearly cannot be granted—The 18th section of the charter gives this Court “power and authority to administer justice, in a summary manner, as nearly as may be, according to the rules and proceedings of our High Court of Chancery,” &c. But it appears, that the Court of Chancery have always disclaimed the power to sell lands under a sequestration. That Court enforced its decrees originally *in personam* merely ; but this peculiar remedy has grown up, and must be strictly pursued. We cannot assume a power not actually exercised by the Great Seal. The cases cited were between Hindus : the property here is to all intents real estate.

MR. JUSTICE GRANT concurred, upon the ground, that the decisions in the former cases proceeded upon the peculiar character of lands owned by Hindus, being then merely in the nature, and possessing all the incidents of personality.

Mr. Montriau asked for costs.

THE CHIEF JUSTICE. We do not give costs. It was a new point, and fit to be argued.

Motion refused, without costs.

Plea Side.

1848.

PETUMDOSS and GOUREE DUTT

January 27.

Thursday,

v.

RAMDHONE DOSS and others.

*Infant—power of to
contract and sue*

ASSUMPSIT, for the non-delivery of goods at Mirzapore, alleged to have been delivered by plaintiffs to the defendants in Calcutta, for the purpose of being carried in the defendant's boat and delivered to the plaintiffs at Mirzapore, for certain reasonable reward. There was also a count in trover for the same goods.

A child of the tender age of three years cannot be constituted, nor considered to be, nor can he hold himself out, as a partner in a trading firm, so as to be enabled to sue in respect of contracts entered into with the firm, nor can the adult members join him as a party suing on record.

Pleas—to the 1st count. Not guilty, and 2ndly that the goods had been delivered to the defendants in April 1846, by one Sookhanund to be conveyed by boat to Mirzapore, and there to be delivered to the order of Manickram and Bucktaurmull; that the defendants did accordingly on their arrival deliver the goods to Bucktaurmull's agents for himself and to Manickram; concluding with a special traverse that the plaintiffs caused to be delivered to the defendants the said goods or that the latter took them in manner alleged.

To the count in trover the defendants pleaded not possessed.

At the trial it appeared that the plaintiff Petumdoss was the father of the other plaintiff Gouree Dutt, who was his youngest son, and a child of only three years of age. No proof was given of the son's participation in the profits, or that he had any interest in the concern, beyond the mere use of his name by the father.

It was urged on behalf of the defendants, that on this ground the plaintiffs ought to be nonsuited. The Court reserved the point, and ultimately found a verdict for the defendant on the special pleas, giving the other side leave to move to set that verdict aside and enter it for the plaintiff.

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A rule nisi having been obtained accordingly,

Mr. *Morton* showed cause. The question reserved at the trial was whether an infant of tender years, whose name had been used by his father in the firm of the latter, could properly be made a plaintiff on record, as a contracting party. The infant in this case was a child of only three years of age. It is absurd to suppose that one so young could be capable of judging of the benefits or disadvantages incident to the position of a partner in a trading concern. No evidence was offered showing that he participated in any way in the profits of the partnership, or derived the slightest benefit therefrom, or that he was interested at all in it. Even if that were so, and the father managed the concern and traded for their joint benefit and advantage, yet, as far as regards the public, this infant cannot be supposed to be of sufficient capacity to contract. The mere use of his name in a partnership firm cannot entitle his partner to put his name on the record: for an infant of such tender years could not give his assent to the using of his name for that purpose, nor, in fact, can he be considered of capacity sufficient to enable him to contract at all. If he had been old enough to have exercised a sound judgment and discretion the case might be different.

Mr. *Dickens* and Mr. *Ritchie* in support of the rule. An infant is not by Hindu law prevented from suing, if he pleases; nor is there any law in England establishing the contrary. There an infant can sue, but he cannot be sued, if he choose to avail himself of the defence of infancy. The statute is intended for his benefit, and he may enforce the performance of contracts against those with whom he has entered into them, but he cannot be sued himself, unless, indeed, he subsequently recognize such contracts, when of age. From the fact of

the son's name having been used in the firm, the Court will presume that the son had an interest in the partnership, in respect of which he may sue. The burden of proof to rebut this presumption rests with the other side. At all events, this infant, from the position in which he has been placed by his father, had an interest, which he may repudiate or not when he comes of age. He would then be liable on his antecedent contracts; and there is no reason why he should be disabled from *suving* at once for the breach of those now entered into with him.

It is a custom very prevalent among Hindus, either from religious or superstitious feelings, to introduce their infant sons by name into partnership with themselves. Suppose Petumdoss the father were to die, it is clear that Gouree Dutt, the son, would be entitled to retain against the representatives of his father the share which he possessed in the partnership property.

SIR L. PEEL, C. J.—The right of the two co-plaintiffs to join in this action depends entirely on this, whether they are partners in trade. The contract was entered into by an agent for a firm, which includes the names of the two plaintiffs, father and son, Hindus. The son is proved to be only three years of age, and it appears that there are other sons of the father. The witness who said that they were partners, appears to us to have drawn that conclusion merely from the use of the child's name in the firm. The law of joinder of parties is a law of procedure, and is governed by the *lex fori*. It is desirable that it should be uniform. If we were to decide in this case that the infant son may be joined, it would be equivalent to a decision that he and others, situated as he is, must be joined in all cases as co-plaintiffs, and as this could only proceed on the ground of a real partnership, evidenced by the mere use of a name, it would be really equivalent to deciding that such infants might be joined

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as defendants at the pleasure of a plaintiff. As a defendant, indeed, the infant might protect himself by a plea of infancy; the basis of that defence, however, is that a contract in fact made by an infant is defeated by his plea of a personal exemption from liability on his contract; but though the infant might protect himself from a judgment passing against him, still he might be subjected to loss by suits instituted against him, though terminating in his favour. If necessarily joined as a plaintiff, a judgment for costs might pass against him, his property might be affected by judgments not operating merely on descendible property or assets, but on his own personal acquisitions, or on property derived otherwise than by descent from a father. The propositions urged relate to sons of sufficient age to contract in fact.

A trading partnership is a consentient contract. The consent of a child of such tender years cannot be given, and it is perfectly idle to talk of a child of three years of age holding itself out as a partner in a firm. A trade may be directed to be carried on for the benefit of infants, but without their consent they cannot be made partners. A trade, like other personal property, is descendible amongst Hindus, but in the life time of the father, by the law, as settled in Bengal, the right of the sons in the father's ancestral property is inchoate, and incomplete, and subject to his disposition, and the argument on the descendible quality of the cotee proves too much, as, if valid, it would prove that the non-joinder of the other sons might have been objected, which clearly could not have been objected. The alleged usage of Hindus in introducing the names of such young children into the firms under which they trade, would prove, in cases circumstanced as the present, no more than that the competent members traded under a partnership name, comprising other names besides those of the real partners. A parent may constitute a trust as to the profits of a partnership by the

introduction of the name of an infant child. That would depend on the intention and the circumstances of the particular case; but it would be at once dangerous and novel to hold that any such usage, whether originating on mere whim and caprice, or from whatever motives proceeding, constituted such infants of the tenderest age real partners, so as to render them necessary parties to suits, and thus to render them subject to liabilities not of their adoption, nor flowing from descended property, nor limited by it.

Rule discharged.

Plea Side.

MALCOLM and others *v.* SMITH and another.

ASSUMPSIT by the plaintiffs as indorsees, against the defendants, the drawers of a bill of exchange, in the following form:

Calcutta, March 6, 1847.

Ten months after date of this our first of exchange (second and third of the same tenor and date not paid) pay to ourselves, or order, the sum of one thousand one hundred and forty six pounds, ten shillings and six pence, and place the same, with or without advice, to account of the Santipore Sugar Concern.

(Sd.) SMITH, COWELL AND CO.

Agents.

*To Messrs. Samuel Phillips and Co. }
St. Helen's Place, London.*

Across the margin of the bill were the words "*Santipore Sugar Concern.*" The instrument was also endorsed "*Smith, Cowell and Co. Agents.*"

The defendants carried on business in Calcutta under the name and firm of Messrs. Smith, Cowell and Co. and were the Calcutta Agents of the Company called

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Wednesday.

February 9.

S. C. & Co. draw and endorse a bill of exchange, adding to their signature the words "agent," and in the margin of the bill the words "Santipore Sugar Concern." Held, that S. C. & Co. were personally responsible.

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the "Santipore Sugar Concern," on whose account they drew the bill of exchange in question, which, (amongst many others of a similar tenor) was sold in the Calcutta market as the bill of the Santipore Sugar Concern. The plaintiffs were admitted to be *bona fide* holders for value. A large number of similar bills had been previously drawn and negotiated: and these had been paid in due course until the insolvency, in October, 1847, of Messrs. Phillips and Co. (the drawees) the London agents, and of Messrs. Murray and Co. the Liverpool agents of the Santipore Sugar Concern. The deed of that Company contained no express power to draw bills, but the authority to draw was not disputed. At the trial a verdict was found for the plaintiff, with liberty to the defendants to move to enter a nonsuit, on the ground that the description of the defendants on the face of the bill as "agents of the Santipore Sugar Concern" exonerated them from personal liability.

A rule having been accordingly obtained—

Mr. *Morton* and Mr. *Taylor* showed cause.—The defendants, and none else, are the parties liable on these instruments; for, even supposing that they had authority to bind the Company, they have not done so, but have bound themselves only. The word "agents" *per se* has no meaning at all. It may be descriptive merely, and not indicative of the character in which the signature was affixed. At all events this description is most ambiguous. Parol evidence was necessary to supply one link at least, if not more. Of whom were defendants agents, and to what extent? They might be agents of this Company in a variety of ways, and yet not agents for the purpose of drawing bills in their name. The real question is who are the drawers and indorsers on the face of the bill itself. A man may be agent in a matter, and be known as such in it, and yet pledge his own personal credit, and

that only. It is true that no English case is to be found in the books precisely similar to the present, but the principle of many decisions will serve to govern this question. In the case of *Thomas v. Bishop* (a) a bill was drawn on the defendant, as follows :

At thirty days sight, pay to J. S. or order £200, value received of him, and place the same to account of the York Buildings Company, as per advice of

CHARLES MILDMAY.

To Mr. Humphrey Bishop }
Cashier of the York Buildings Co. }

The defendant accepted the bill thus “accepted 13th June, 1832, per H. Bishop.” The bill being dishonored when due, an action was brought against Bishop, personally, and it was held that he was personally liable on his acceptance. No doubt, if from the nature and terms of the instrument, it clearly appears, not only that the party is an agent, but that he means to bind his principal and to act for him, and *not* to draw, accept, or endorse the bill on his own account, that construction will be adopted, which is in furtherance of the actual intention of the instrument. But if the terms of the instrument are not thus explicit, although it may appear that the party is an agent, still he will be deemed to have contracted in his personal capacity : and this particularly if it appear that no other person than himself can be legally bound.

Ledbitter v. Farrow (b) is the nearest authority in favor of the proposition contended for. There an agent to a country bank, to whom the plaintiff sent a sum of money in order to procure a bill upon London, drew in his own name for the amount upon the firm in London, the two firms being the same : it was held that the agent was liable as drawer, although the plaintiff knew that he was

(a) 2 *Strange* 955.

(b) 5 M. & S. 345.

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agent, and supposed that the bill was drawn by him as such, and on account of the country bank. The language of Lord Ellenborough in this case is very strong, for he says that a man who puts his name to a bill of exchange thereby makes himself personally liable, unless he says plainly "I am the mere scribe." Here there is no pretence for urging that the bill purports to be drawn by procuration. In *Story on Agency*, where the decisions in the American Courts are collected, the cases are so conflicting, that they are scarcely to be depended upon as authorities. One of them, however, is expressly in point, viz. *Pentz v. Stanton* (a) where an agent drew a bill for a purchase of goods on account of his principal, and signed the bill "A. B., agent" not stating the name of his principal, and it was held that he and not his principal, was personally bound by the bill, as drawer.

The mere fact, that bills similar to these in form have been paid in due course for years before, proves nothing. That circumstance cannot decide the question as to who are the drawers of this bill. The case of *Bramah v. Roberts* (b) shows that in respect of ratification by a course of dealing the members of a joint stock company are in a different position to that of the members of an ordinary co-partnership. Ratification by some of the members does not bind the others, any more than the original act binds those not assenting to it directly.

Mr. *Prinsep* and Mr. *Ritchie* in support of the rule.—No one looking at this bill could doubt for a moment that it was drawn for and on behalf of any other than the Santipore Sugar Concern: the bill manifestly pledges the credit of that company, and not the credit of the defendants individually. Now, no particular form of words is necessary in signing by procuration. True, the more regular course

(a) p. 125. note 3.

(b) 3. B. N. C. 963, 6 L. J.
(N. S.) C. P. 346.

is to write the name of the principal, and then the name of the agent, stating that the signature is by procuration; or else state that it is drawn “*for A. B. or C.*” But it is enough, if this appears from the whole instrument; and those words need not immediately precede the signature. In this instance words equivalent are used. The expression “agents” beneath the signature of the defendants, show that they were signing per procuration, and the name of the principals is supplied by reference to the body of the bill, and the words “Santipore Sugar Concern” printed in the margin. The effect of these words then are of equal power with those printed or engraved on Bank of England notes, viz. “For the Governor and Company of the Bank of England.”

No case has occurred in England, nor is there any reported, precisely similar to the present: it would be extending the principles even in *Thomas v. Bishop* too far, to hold the defendants personally responsible. As to that case, Mr. Justice Story, in his work on the law of agency, says (a) “this case seems to press the doctrine to the utmost extent of the law, if, indeed, upon principle it is sustainable at all.” And again (b) “the case of *Thomas v. Bishop* would make one pause as to the extent to which the doctrine should be carried. The only point of doubt is, whether a bill so drawn is not to be deemed as drawn on the cashier officially, and accepted by him officially, and therefore as excluding a personal responsibility. Suppose a cheque, drawn on the cashier of a Bank, as such, and accepted by him, would he be personally responsible on the acceptance, or would the bank be responsible? Drafts drawn on and accepted by cashiers of banks are usually treated as official transactions, and binding on the bank, and not merely on the cashier personally.”

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(a) p. 129, note 3.

(b) p. 231, note 4.

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No doubt the rule is strict in relation to the mode of executing sealed instruments; but a more liberal exposition is allowed in cases of unsolemn instruments, and especially of commercial and maritime contracts, which are generally drawn up in a loose and inartificial manner. Several of the American authorities cited in Story on the Law of Agency are in favor of the defendants, though some decide the other way, as in *Pentz v. Stanton*, cited for the plaintiff. In *Long* against *Coburn* (a) an agent duly authorized, made a promissory note thus, "I promise to pay J. S. or order, &c." and signed the note, "*pro C. D. A. B.*"; it was held to be the note of the principal, and not of the agent, although the words were "I promise." So, where the note was "I promise, &c." and it was signed by the agent "For the Providence Hat-manufacturing Company" A. B. (the agent;) it was held to be a promissory note of the Company, and not of the agent. (b) So a promissory note of a like tenor signed by the agent in this manner "A. B., agent for C. D." has been held to be the note of the principal and not of the agent.

It is clear, looking at this instrument, and taking the signature in connection with the words in the margin, that the bill was the bill of the company, and that the defendants drew as their agents; the former therefore ought to be made the responsible party.

SIR L. PEEL, C. J.—I have not the slightest intention of treating the American decisions with disrespect. They are not authorities to which we must yield, as to the decisions of our own superior Courts; but they are in general well deserving of attention, as able expositions of the law. The case quoted therefrom for the plaintiff is precisely in point, but as the American cases seem to be

(a) p. 124. note 4.

(b) *Ibid*, note 5.

in conflict on this question, we cannot place reliance on them, and must lay them aside altogether. The precise point has not been decided by any reported case in the Courts in England, but the principle deducible from the English cases is, that a party in fact drawing a bill of exchange must show unequivocally, on the face of the instrument, that he is not to be liable as drawer. It may be perfectly well-known that the drawer of a bill is an agent, and that he draws the bill with reference to the concerns of his principals, and not of himself; this may be collected as well extrinsically, as from what appears on the face of the instrument, yet his liability as drawer will be clear, if he sign his own name simply. It is not disputed, for instance, that, but for the addition of the word "agent" to their signature as drawers and indorsers, Messrs. Smith and Co. would have been liable yet the argument from the general frame of the bill would have been equally applicable. The case therefore depends wholly on the addition of the word "agents" to their signature as drawers and indorsers. The bill is made payable to "ourselves or order." Let it be supposed that Messrs. Smith and Co. had not endorsed the bill, and that it had been accepted, but not paid, and that they had sued on the bill, describing themselves as the drawers; could the acceptors have defended the action by saying merely "you are not the drawers, the Santipore Sugar Concern are the drawers on the face of this bill, and we are liable only to them?" It appears to us that that defence merely, would not have availed, for no signature, as drawer of the bill in the name of that firm, is affixed to the bill. If the addition of the word "agents" to their signature were held to exonerate them from liability, it would be giving to those words the effect of a signature *sans recours*. The words may have been descriptive and not restrictive; and the case of *Ledbitter v. Farrow* appears to us to lay down a sound rule, to which

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we ought to adhere. It is easy for a drawer of a bill, who means that there should be no recourse to him, to use unambiguous and unmistakeable forms of expression, which may inform every taker of the bill that there is to be no such resort ; and when it is considered that a bill of exchange is different from ordinary contracts, and that it operates by the law merchant, a general law, and not merely the municipal law of a particular state, the impropriety of deciding on such an instrument with reference to the law of principal and agent merely of the particular state, will be apparent. This rule is not applied by English law even to English inland bills, for the principal, whose name is not on the bill, is not liable, though known ; whilst the agent, whose name is on the bill, is liable, though known to be contracting as agent at the time, and though the principal be also known and within reach of process. It certainly is abundantly clear, that the defendants signed this bill, not for their own purposes, but for the purposes of their principals, and the bill discloses clearly that the Santipore Sugar Concern were those principals, but that alone is not sufficient, according to our construction of decided cases.

Rule discharged.

Plea Side.

GASPER v. MYTTON.

1848.
Feb. 10.
Thursday.

TRESPASS for false imprisonment: the defendant pleaded "not guilty," by statute. The cause was tried on the 3rd day of December, 1847, before Sir L. Peel, C.J. and Sir Henry Seton, J. (a) and the following facts were proved.

The defendant was a civil servant of the East India Company in the Bengal presidency, and a justice of the peace for the town of Calcutta, and also held the appointment of Magistrate of the district adjoining Calcutta, called the 24-Purgunnahs. The plaintiff was an Armenian gentleman, residing at Garden-Reach, in the district of the 24-Purgunnahs.

On the 3rd of June, 1847, a petition was presented to the defendant by a native of the name of Gouse Mullick, charging one Malcolm Gasper and others with assaulting and beating him. On his affirming to the truth of his petition, a summons was ordered to be issued to the parties charged, and subpoenas to the petitioner's witnesses, and the case was made over for trial to the Junior Assistant Magistrate, Mr. Young, (a civil servant of the East India Company.)

On the 5th of June following, Thomas Higgins, (the constable charged with the duty of serving the process,) by way of return to the summons, made thereon the following report, in the Bengali language and character, of which the following is a translation:

To the incarnation of righteousness, mighty and powerful.

In the charge of the complainant Gouse Mullick, inhabitant of Soortee Bagaun, in the city of Calcutta, against Malcolm Gasper, Saheb, the defendant, inhabitant of Maiteah Boorooj, for beating and

*Trespass
Justice of Peace
Justification.*

Trespass for false imprisonment. Plea not guilty by statute. The defendant, (a mofussil Magistrate and J. P. of Calcutta) issued a summons to one Gasper charged with assaulting G. M. The constable who served the summons reported that Gasper had committed a contempt of process and had refused to attend. The defendant then passed an order for the caption of Gasper, unless he appeared by a given day. The constable again made a similar report, and also made deposition before the junior Magistrate (to whom the case had been referred for trial) implicating both Gasper and his father. The junior Magistrate wrote an order for issuing a warrant, and accordingly upon that order a warrant was issued, directing the apprehension of both father and son, and signed by the defendant as Magistrate and J. P. Under it, the two Gaspers were taken. Held that the defendant having signed the warrant as a Justice of the Peace must be taken to have issued it in that character, and that, as a Justice of the Peace, he had acted wholly without Jurisdiction, and was liable.

(a) Grant J. was absent.

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striking, and not giving him his wages, for the purpose of serving the summons issued by the Huzoor or presence directed to the defendant and the subpoenas directed to the witnesses, I, your obedient servant, taking along with me Nermut Khan and Johceeruddeen, burkundazees (policemen) of this station, and Bhozoo and Moazim Hossain, burkundazees of the Moochee Kholah station, and on our arriving at the principal gate of the house of the said Saheb this day, pursuant to the prohibition of the said Saheb, his door-keeper not allowing us to go into the house, we remained standing at the principal gate, and in consequence of the intimation given by the said door-keeper, the defendant, Malcolm Gasper, and his father, M. Gasper, having come to the gate, and upon my putting into the hand of the defendant the summons and the subpoenas directed to the witnesses, on his becoming acquainted with the contents, he threw down the summons and subpoenas on the ground, and afterwards caused them to be flung out into the public streets beyond the gate, and said "I do not obey this order. I will not attend before the Huzoor or presence." On his not giving a receipt and going away, I, your obedient servant, calling upon the burkundazees and others to witness the occurrence, and transmitting this my return to the summons, for the information of your Huzoor, I make the aforesaid communication; whatever be your order upon perusal, you, the incarnation of righteousness, are the disposer. 5th June.

(Sd) T. HIGGINS.

With this report the constable (Higgins) sent in also another to the same effect, in English. These reports were brought in due course before the defendant, who thereupon wrote, in his own hand, across the Bengali report, an order, in the following words:—

It is ordered that if (a) appear not on the 6th instant, in that case let an order for his caption be issued; year 1847, the 5th day of June.

(Sd) R. H. M.

On Monday, the 7th of June, Higgins again appeared before Mr. Young, and preferred a complaint (verified by oath) in the following terms:—

(a) blank in the original.

R. H. Mytton, Esq.

SIR,

I beg to state to your worship, that on the morning of the 5th of June, 1847, I served Mr. Gasper with the summons. I asked him if he would be so kind as to give me an acknowledgment for the summons that I had served on him, which he refused doing, and threw the summons on the road: he told me that he would not attend at the Court on the 7th June. Your worship, I asked him if he would be so kind as to allow me to go down to his quarters to serve the summonses on the native servants that were to appear as evidence: he ordered me to give it to his Sircar. Mr. Gasper was then present when I did so. Your worship he took it out of his Sircar's hands and threw it on the ground, and then ordered the durwan to throw the summonses out of the gate, in the presence of the burkundazees that were on duty with me.

Your most humble Servant,
(Sd.) T. HIGGINS,

5th June, 1847.

Constable.

The deposition of Higgins and of the other witnesses were then taken, an order was made by Mr. Young, and, consequent thereon, the following warrant was issued, and signed by the defendant:—

No. 600.

To T. Higgins and J. Harris, Constables, and to all other Constables and other peace officers within the provinces, districts, and countries of Bengal, Behar, and Orissa.

These are to command you to apprehend and to take the bodies of Malcolm Gasper and his son, Mr. Gasper, junior, they the said Malcolm Gasper and Mr. Gasper, junior, being charged before me, one of Her Majesty's Justices of the Peace, with assault and resistance of process, and them, the senior Malcolm Gasper, and Mr. Gasper, junior, bring before me, to answer the said charge, and to be further dealt with according to law.

(Sd.) R. H. MYTTON,
Magistrate and J. P.

Given under my hand and seal, }
this 7th day of June, 1847. }

(on back)

Certified that this warrant has been duly executed this 8th day of June, 1847.

Zillah 24-Purgunnahs.

(Sd.) J. HARRIS.

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Early the next morning, the constable, Higgins, proceeded, accompanied by 25 burkundazees, or policemen, to the plaintiff's house at Garden Reach, and arrived there at 6 o'clock, A. M. They then took the plaintiff and his second son into custody. (a) The former requested to see the warrant, in order to ascertain the nature of the charge: this was refused:—the plaintiff and his second son were then removed, and taken before the defendant at his private residence, when he offered to release them on their recognizances; but as their request to see the warrant under which they had been arrested was refused, they declined to enter into any recognizances: whereupon they were taken, by the defendant's order, to the Allipore jail and thence to the Magistrate's Court: and thence at noon to the Assistant Magistrate (Mr. Young) and there, by him, sentenced to pay a fine of Rs. 12 each; this was paid, and they were released.

The defence, and the evidence offered in support of it, are fully referred to in the verdict of the Court, delivered much in the following terms, by

SIR L. PEEL, C. J.—The defendant is connected with the assault and imprisonment complained of in this action, by proof of the warrant and commitment signed by him, under which, in fact, they were made. The defendant can be made liable only for those acts which he directed to be done, and for this reason I interfered to prevent the acts of Mr. Young from being tendered as evidence against him. Upon the same principle, whatever jurisdiction Mr. Young might have had to issue a warrant of arrest, that ground of jurisdiction cannot be trans-

(a) An action was also brought by the son against the defendant for assault and false imprisonment. A verdict was taken by consent, with Rs. 100 damages, to abide the event of the other action, on the argument of the rule hereafter referred to.

ferred from him to the defendant, whose warrant must be supported, (since a warrant of arrest does not support itself) by proof of its having originated in a judicial proceeding, either instituted before himself, or transferred to his judicial cognizance, that is, subjected to the exercise of his own judicial mind. The protection which is afforded to judges, is granted on grounds of public policy, not as a personal privilege, but for the public good, that they may the more freely exercise their judgment, undeterred by fear of vexatious suits for acts done in their judicial capacity. It is the very foundation of the protection, that the act for which such protection is sought, be a judicial act; a mere warrant of arrest, as I have said, must have a foundation to support it; and it lies on the defendant to show this foundation. The original complaint was for an assault, and the process which issued on that, viz. the summons, was clearly based on a sufficient ground of jurisdiction. The summons was directed against one individual only; the christian name was not the correct description of the plaintiff, or of any of his sons, but it is evident, from the conduct of the constable, that one person only was to be summoned, and that person not the plaintiff. The offence with which the plaintiff was subsequently charged, and on which the warrant of arrest issued against him, was a distinct offence. It differed in the persons charged and offended against, in the matter of the offence, and in the time of its commission. The first proceeding, therefore, is merely introductory and explanatory of, and is not to be confounded with, the alleged offence, to which the warrant of arrest related. It is the fault of the general mode of pleading which is permitted to some particular description of persons, that it furnishes no distinct information to the opposite party or to the judge, of the grounds on which a defence is meant to be rested. Up to the time of trial this defect prevails, but at the trial it is essential

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to the correct decision of a case, that it should be stated distinctly on what the justification is rested ; this is required out of justice to the opposite party, as also for the information of the Court itself, which might be otherwise under difficulties in deciding the case. It was for this reason that I earnestly pressed to know whether the justification was intended to be based on the deposition taken before Mr. Young, as the sole ground of the jurisdiction, or on that with either or both of the reports of the police officer, or on the reports, or either of them alone. At first the defendant's case of justification appeared to rest on the ground of the deposition only. I pointed out to the defendant's counsel that the deposition was made before and taken by another Judge, viz. Mr. Young. The answer was that it was one Court, and it was then contended, with some confidence, that in granting such a warrant, one Judge might hear the evidence and not act ; and another act, without either hearing or considering the evidence which alone could support his act. I stated that such a position, so monstrous and devoid of principle, could be supported in this case by proof alone that some legislative power had established it ; and that no mere practice could establish it. Mr. Colvin was examined as a witness to prove this alleged practice, but his evidence showed that no such practice was sanctioned, but merely that one Judge might take up and judicially consider a case not originally proceeded with before himself, a very different proceeding, and a judicial one. The evidence having failed to prove this alleged practice, and there being no evidence to show that Mr. Mytton in fact either saw or considered the deposition taken before Mr. Young, the deposition could not be supported, as the ground of jurisdiction. Another ground of jurisdiction, not originally advanced, was consequently relied on, viz. the report of the police officer, which, under the regulation referred to during the progress of the trial,

might, if it had been proved to have been seen or considered by Mr. Mytton before granting his warrant, have served as a foundation of jurisdiction. But here the evidence was also defective. To establish such a ground of jurisdiction, it would not be enough to prove that such a report had reached the office, it was necessary to show that, in fact, Mr. Mytton was cognizant of its contents, and founded his warrant on them. If this had been shown, we should have to consider whether the facts, as stated in the report, might, on any judicial construction of them, though erroneous, be viewed as containing a charge of resistance ; and our mere difference of opinion from the judgment which in that hypothesis would have been formed of them by Mr. Mytton, would not have justified us in treating the warrant of arrest as wanting jurisdiction. But the direct testimony does not show that those reports or either of them really formed any part of the basis on which the warrant rested. Had the warrant been consistent with them, or either of them, there might have been sufficient evidence from which to presume, (a presumption, however, but weak as inferential evidence in a case circumstanced as the present,) that the reports, or one of them, formed the basis of the warrant. But the warrant which refers to a charge, and is directed against two persons, is much more consistent with the deposition than with either report. The reports are not consistent with each other, and both vary from the deposition ; and under these circumstances, considering how the justification was first sought to be supported, that the warrant is not consistent with the reports, and is much more consistent with the deposition, we cannot *infer*, in the absence of direct evidence, that the reports, or either of them, reached Mr. Mytton in time to undergo, and actually underwent, his judicial examination ere he signed the warrant. The evidence, therefore, fails to show that he proceeded judicially, either on deposition, or report, and

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the case, on the evidence, is one of arrest and imprisonment, on a mere unsupported warrant of arrest, issued by a Magistrate, without information, complaint, or report, and all the assigned grounds of jurisdiction being unsupported by the evidence, we find our verdict for the plaintiff.

Although the arrest appears to have been conducted improperly, there is, in our opinion, no ground whatever to attribute to Mr. Mytton any harshness of conduct to the plaintiff—no oppressive spirit, but the contrary, appears to have animated him.

Our verdict is for the plaintiff—damages Rs. 100, and we give leave to the counsel for the defendant to move if, and as he shall be advised, in order that it may be fully and more maturely examined, whether any error of fact or of law can be imputed to our decision.

In pursuance of the leave reserved, a rule was moved for and obtained on behalf of the defendant, to show cause why the judgment, in the nature of a verdict given for the plaintiff, should not be set aside, and why a judgment, in the nature of a verdict, should not, in its stead, be entered for the defendant, or why there should not be a new trial, on the ground of the verdict being against evidence.

Jan. 20th, 1848. Mr. *Dickens* and Mr. *Morton* showed cause.—The form of the rule obtained is very unusual. At the trial the defence was ambiguous enough, and even now it is impossible to guess upon what particular ground of justification the defendant relies.

(Mr. *Clarke*—In the first place among the documents produced at the trial there was an order in Bengali, of prior date to the warrant, as to which the attorney for the defendant has filed an affidavit, showing that the transla-

tion was erroneous in respect of the date, and that the order itself had been attached to the report of Higgins the constable ; this, it is contended, is proof that the report was before the defendant when he wrote the order, and that it, therefore, formed a substantive foundation for issuing it.

2ndly,—The plaintiff at the trial put in a statement of Higgins the constable, taken before Mr. Young, the Assistant Magistrate, complaining of resistance of process, and upon that statement Mr. Young ordered an arrest. Now, the proceedings in the Mofussil are somewhat different to those of Her Majesty's Courts. In the latter, no doubt, the practice is, that a warrant must issue upon the depositions by the functionary before whom those very depositions have been taken ; but in the Mofussil there is an intermediate order, between taking of the depositions and issuing the warrant, which renders it competent for the principal Magistrate to sign the process without reference to the evidence sworn before the Magistrate, his assistant. Here Mr. Young had issued an order for a warrant, and the defendant had issued his order upon that warrant, which was a legitimate foundation for such process.

[*The Chief Justice*.—That is quite new matter ; no evidence of this appeared at the trial.]

Mr. *Clarke*.—The practice of the Mofussil Court is matter of law, defined by regulation, and by orders or decisions of the Sudder Court : if this is established, the necessity that the depositions should be before the principal Magistrate, when issuing the warrant for arrest, will be entirely disproved.)

The grounds of justification are just as much in the dark as before ; this defence certainly was not insisted on at the trial in any way. The justification was an al-

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ternative one. 1st. It was founded on the depositions before Mr. Young; and 2dly. if this failed, upon the report of the constable. The Court intimated on the former occasion that a deposition taken before one Magistrate could not be a justification of a proceeding in the same matter before another.

[*The Chief Justice.*—The Court did not go that length. What we said was that if the Mofussil Court sanctioned the practice of one Magistrate taking up a case in its inception, and of another Magistrate proceeding with it subsequently, such practice ought to have been proved strictly by proper evidence. Now the point insisted on was; that, where one Magistrate had heard evidence in a case before himself, and another, without any knowledge of that evidence, derived either from perusal of the documents, or from communication with the principal Magistrate, had issued a warrant for arrest, (in a criminal matter, too, like this,) the latter was justified in so doing. The Court required proof of this. The evidence of the witness called with that view failed in establishing the point, for it simply amounted to this—“that if one Magistrate took up a case in its inception, another might continue it, after having acquainted himself with the subject matter of the charge, and of the circumstances attending it prior to his interference.” The difficulty the Court felt at the trial was to ascertain on what specific ground the justification proceeded: it was altogether involved in uncertainty.]

No evidence whatever was given to show that the proceedings taken before Mr. Young (even inclusive of the order upon which so much reliance is now placed) were in any shape or way before the defendant, at the time of his issuing the warrant. And yet, if the defendant relied on this as a defence, it was *his* duty clearly to have

proved it. Here a plea of the general issue (which of itself gives no information at all to the plaintiff as to the intended justification) is placed on record, and, under that plea, evidence is given of a justification founded on the alternative of two different defences. Surely it is incumbent on a party, in common fairness, to point out specifically on what ground he justifies.

Then as to the evidence—The affidavit of the plaintiff's attorney, filed in support of this rule, states, that upon the Bengali report of Higgins was an order (also in that language) dated the 5th of June, 1847, signed with the initials "R. H. M." This had been translated by the Interpreter of this Court, thus, "It is ordered that if—(the name being illegible) appears not on the 6th instant, in that case let an order for caption be issued." The words "*on the 6th instant*" it is said were not on the order at all, but that the terms used were "*on the appointed day*." Be it so; the alteration may be perfectly correct, but it does not in the least affect the question. That order, however, appears upon another part of the document, and must have been written on the perwannah, which was the first paper in connection with this case that had been issued by the defendant. It was addressed to Higgins, and bore the seal of the Magistrate, and directed that, a complaint for assault, confirmed by a declaration upon oath, having been preferred against "Malcolm Gasper, Sahib," a summons should be served upon him, and subpoenas on his servants. This summons (which was intended for one of the elder Gasper's sons, namely the [person who had actually assaulted Gouse Mullick,) was taken to the plaintiff's house for service between seven and eight in the morning of the 8th of June. The summons was served, and then came the prospective order for arrest. The report of Higgins was made, it seems, the same day, and, as stated by him, to have been sent in the usual way through a burkundaz to the than-

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nah, but there is no evidence whatever that it reached the defendant on the 5th ; so that, neither in point of construction nor collocation of circumstances, is it possible that the order for arrest could have issued any day or at any time *in consequence* of this report of Higgins. Now the summons alluded to in the report of the constable was not directed to the father, but to the son, (*not* the son plaintiff in the second action :) the warrant was issued against *two* persons, the father and son,—even, therefore, admitting that the Magistrate was justified in issuing the warrant against the son alone ; how can the issuing it against *both* be justified ?

If the report is the foundation of the justification, how is it that the father is charged with “resistance of process,” or, in fact, with any offence which required the issuing of a warrant ? He is charged with “continuing standing at the gate.” Is this to be tortured into constructive resistance of process ? There is no Mofussil Regulation which legalizes the issuing a warrant for apprehension on a report of a constable not upon oath. On the contrary, Reg. XI. of 1796 directs that “if any person amenable to the authority of the zillah and city Magistrates, or police officers, shall resist, or cause to be resisted, any warrant, order, or other process of any zillah or city Magistrate, or police officer, the Magistrate of such zillah or city, in which such resistance may have been made, on the same being charged *on oath*, shall, if practicable, cause the party accused to be apprehended and brought before him to answer the charge.” (a) The 4th and 8th sections of Reg. IX. of 1807 have been relied on ; but there is nothing in either of those sections to justify a Mofussil Magistrate in acting as the defendant has done, upon the bare statement of a constable, which statement amounted to nothing more than an

(a) Reg. XI. 1796. s. 2.

allegation of contemptuous treatment of a summons from the Magistrate's Court, and that *not* in the presence of the Magistrate. When contempt is committed in the presence of Mofussil Magistrates they have power to deal with it as all other Courts would have under similar circumstances; but no Court of justice has any power or right to take cognizance of contempt committed *out* of Court, and not in the presence of its authorities. No justification then can possibly be founded upon the report. Under any circumstances, the fact of the order of the defendant appearing upon the paper, on which the report was written, bears internal evidence that the order was written in consequence of the perwanneh. That order was for the arrest of *one* (the son who had committed the alleged assault)—upon that order, then, there cannot be a shadow of a justification for the arrest of the father;—nor indeed for the arrest of the son; as there is no regulation authorizing arrest in cases similar to the present.

If the warrant was issued for a contempt, then it contradicts itself, for it recites that Gasper (the Plaintiff in this action) and his son were charged before the party issuing it (*viz.* the defendant) with assault and resistance of process. But it is *not* the fact that they were ever charged with any such offence. The order itself, (even if not founded upon the perwanneh) can be construed only as an order against one of the parties, and the report (if a justification at all) can, upon the most strained construction, be a justification only of the arrest of one. It is submitted, however, that the defendant was not justified in any way in these proceedings, and that the rule cannot be supported.

Mr. *Clarke* and Mr. *Ritchie* contra. One of the most important questions in the case has been altogether avoided in the argument on the other side, and stands

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unimpeached, viz. whether or not a Queen's Court has jurisdiction over the proceedings of the Company's Mofussil Courts in cases similar to this, where the plaintiff is not proved to be a British subject. This question was decided in the negative in this Court in the case of *Calder v. Halkett*; (a) the case was appealed to the Privy Council, and the judgment of the Court below confirmed, upon the ground that there was nothing in the evidence to show that the plaintiff was a British subject, and that the fact could not be assumed, the *onus probandi* being on the party himself. Here also, evidence to that effect is wanting. It had certainly been taken for granted in argument that the plaintiff was a British-born subject, but that is not proof. It is notorious that he was an Armenian. The evidence is also deficient in not showing (if the fact were so) that the defendant had judicial notice of the circumstance. If the Court require no proof of this, it is manifest, that any Hindu, Mahomedan, or, in fact, any foreigner, might bring an action for damages against a Mofussil Magistrate: the effect of which would be to prostrate the whole judicial system of the East India Company before each of the Supreme Courts of Judicature in the three Presidencies.

In the case of *Calder v. Halkett* it is reported, that the respondent, Mr. Halkett, being of opinion that the appellant was concerned in a certain riot, directed a robocarree (or order of instructions for the mode of proceeding in the case) of the Foujdarry Court at Kishnaghur, to be made and passed, by which it was ordered, (amongst other things,) that perwannehs should be written directed to the Darogah, for the apprehension of Mr. Calder. The robocarree was signed by the respondent, and a perwanneh was accordingly issued on the same day, and delivered to the darogah of the thannah of Hans-

(a) 2 Moore's P. C. C. on appeal from the East Indies, 293.

kolly, under the authority of which, the appellant was detained, and kept under surveillance of two burkundazes, within the boundaries of Mr. Andrew's factory.

It was argued, on behalf of the appellant, that "the respondent, a Mofussil Magistrate, had issued a perwannah for the arrest of the appellant, a British-born subject, without the oath of any party being taken, without any charge made, without any accusation, or even accuser, but solely on his own suspicion, drawn, it might be, from the report of the darogah, but of which the respondent was in utter ignorance. The Act of 21st Geo. III., c. 72, was never intended for such a case as this, nor could it be strained to meet it. If the construction given by the Supreme Court to the 24th section was correct, the appellant would be without redress at law; he could not sue the respondent in the district in which the acts happened, and the native Courts of Sudder and Nizamut were Courts of appeal without original jurisdiction. The consequence would be, that the local Magistrates in India would enjoy a protection and immunity not possessed by the judge of the highest Court of record in England."

It was objected, "that admitting Calder was, in fact, a British-born subject, still there was no evidence to show that the Magistrate was aware of the fact"; and Mr. Baron Parke, in his judgment (after considering the construction of the 24th section of the 21st Geo. III., c. 70;) proceeds thus—

"We must consider the defendant as being in the same situation as a criminal Judge in this country, with the qualification, that he had no jurisdiction over one particular class, viz., the European-born subjects of the British Crown; and the question is, whether he is liable to an action of trespass, for causing the plaintiff to be arrested, he being, in reality, exempt from his jurisdiction.

"If the particular character of the plaintiff be not

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taken into consideration, and if the case be treated as if he had been a native subject, there is no doubt that the defendant would have been protected; for it is not merely in respect of acts in Court, acts *sedente curia*, that an English Judge has an immunity, but in respect of all acts of a judicial nature, as was decided in the case of *Taafe v. Lord Downes*: and an order, under the seal of the Foujdarry Court, to bring a native into that Court, to be there dealt with on a criminal charge, is an act of a judicial nature, and whether there was any irregularity or error in it, or not, would be punishable by ordinary process at law. But the protection would clearly not extend to a judicial act, done wholly without jurisdiction; and it is contended, that this order, with reference to a British-born person, is altogether without jurisdiction, because such person was not answerable to the general jurisdiction of the Court; and the special jurisdiction given by the 53rd Geo. III., c. 155, s. 105, did not warrant the mode of proceeding in this case, there being no information or complaint by a native, nor did that section of the statute authorise imprisonment in the first instance."

"But the answer to the objection to the defendant's jurisdiction, founded on the European character of the plaintiff, is, that it does not appear distinctly in the evidence, upon which alone we are to act, whatever our suspicions may be, that the defendant knew, or had such information as that he ought to have known, of that fact; and it is well settled that a Judge of a Court of record in England, with limited jurisdiction, or a Justice of the Peace, acting judicially, with a special and limited authority, is not liable to an action of trespass for acting without jurisdiction, unless he had the knowledge or means of knowledge, of which he ought to have availed himself, of that which constitutes the defect of jurisdiction. Thus in the elaborate judgment of Mr. Baron Powell in *Gwynn*

v. *Poole*, (Lutw : App. 566), it is laid down, that a Judge of a Court of record in a borough was not responsible as a trespasser, unless he was cognizant that the cause of action arose out of the jurisdiction ; or at least, that he might have been cognizant, but for his own fault ; which last proposition Mr. Baron Powell illustrates, by a reference to the case of the Marshalsea Court, which had jurisdiction only in certain cases where the king's servants were parties ; who, being all enrolled, the Judge ought to have had a copy of the enrolment, and so would have known the character of the parties. It is true, says Mr. Baron Powell, (speaking of the case of a borough Court) that the cause of action does not arise within the jurisdiction of the Court, as it ought to do, but as the Judge cannot know that, except by the plaintiff or defendant, until he knows it, the rule shall be, in this case, as in others, *ignorantia facti excusat*. Mr. Baron Powell lays down the same rule as to a party ; but his opinion in that respect is disapproved of by Lord Chief Justice Willes, in *Moravia v. Sloper* (Willes, 35), but not so far as it relates to a judge or officer."

"The like rule has been followed, in the case of Magistrates acting under the special powers of Acts of Parliament, who are not liable as trespassers, if the jurisdiction to inquire into the facts stated before them, and nothing appears on one side or the other to show their want of jurisdiction. *Pike v. Carter* (3 Bingham, 78), *Lowther v. Earl of Radnor* (8 East, 113). It is clear, therefore, that a Judge is not liable in trespass for want of jurisdiction, unless he knew, or ought to have known, of the defect, and it lies on the plaintiff, in every such case, to prove the fact."

"In the case now under consideration, it does not appear, from the evidence in the case, that the defendant was at any time informed of the European character of the plaintiff, or knew it before, or had such information

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as to make it incumbent on him to ascertain that fact. The point, therefore, which is contended for by the plaintiff, does not arise; and it is unnecessary to determine, whether, if distinct notice had been given by the plaintiff to the defendant, or proof brought forward that that defendant was well acquainted with the fact of his being British-born, the defendant would have been protected in this case, as being in the nature of a Judge of record, acting irregularly within his general jurisdiction, or liable to an action of trespass, as acting by virtue of a special and limited authority, given by the statute, which was not complied with, and therefore altogether without jurisdiction."

"The only doubt their Lordships have had in the consideration of this case, is, whether the evidence was sufficient to show that the defendant knew, or ought to have known, that the plaintiff was a British-born subject. They have had none, that it was competent for the defendant to give his defence in evidence, under the general issue, by force of the statute 42nd Geo. III., c. 85; s. 6, if not at common law."

Here, also, there is no evidence, showing that the plaintiff was a British-born subject, or that the defendant had judicial notice of that circumstance.

Then as to the facts of the case.—It has been contended that the defendant has relied upon inconsistent and alternative defences; that he cannot do so, and must make his election. The defences here may be distinct, certainly, but, it is submitted, they are quite consistent with each other.

First—It is submitted, the defendant must be presumed, on the evidence as it stood at the trial, to have seen the depositions sworn before Mr. Young before the warrant was issued: this would render the warrant equally valid as if the depositions had been sworn before the defendant himself. Secondly—The constable's report was before the defendant; and of this there was not merely pre-

sumptive but positive evidence. Thirdly—the order from the Assistant Magistrate that a warrant should issue was also before the defendant—this, by the practice of the Mofussil Courts, was also of itself sufficient, even if neither depositions or reports had been before him. And lastly the defendant was acting as a Judge of the Foujdaree Court, in a matter over which he had jurisdiction as a Judge—and in that capacity he is protected from the interference of this Court by the statute, even if no charge, no report, no deposition whatever, had been proved to have existed at all; and even if the whole proceedings had been as bad and irregular as represented by the plaintiff. In these several defences there is no inconsistency. The failure of any portion cannot affect the validity of what remains.

First—It is necessary, before proceeding, to explain that the term “resistance of process” bears, in the Mofussil Courts a signification somewhat different to that put upon those words in this Court. A mere non-compliance with the order of process, provided it be wilful, even where no actual violence or breach of the peace is committed, is construed in the Mofussil as “resistance.” The term is a technical one, and if open to objection as not conveying the idea intended to be expressed, it is not more so than are many similar terms of art in the constitution of the English law. In proof of this construction of the term “resistance” it is only necessary to refer to the Circular Orders of the Sudder Adawlut. (a) These orders show that it was not necessary that there should be an actual breach of the peace in order to enable the defendant to proceed in his character of Magistrate.

Then the deposition sufficiently shows that a resistance of process had actually occurred: it is not necessary that

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(a) Order 615, interpreting Reg. Order 1033, interpreting Act 7;
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the facts stated in the deposition should show conclusively, that the party has been guilty of the offence charged, or that this Court should be satisfied that they amount to decisive evidence against him—and, however weak it may be, the Court cannot question the Magistrate's exercise of discretion in deeming the deposition sufficient—*Cave v. Mountain (a)*. If it be necessary, the presumption is, that the depositions were before him, and that all his proceedings were regular. It is not for the defendant to show, in order to justify his acts, that he had examined the witnesses himself, or read over the depositions taken before his assistant, or informed himself of the subject matter of the charge, by official communication with that assistant. The necessity of all this proof lies clearly on the plaintiff.

It would be physically impossible for the Magistrate of any large district like the 24-pergunnahs to recollect every step he may have taken in any particular proceeding, considering the immense number of documents perpetually laid before him. It would rather be assumed that the warrant had been issued after the due exercise of a judicial mind, upon evidence before him at the time, and motives of public policy would induce the Court to entertain such a presumption in favor of the Magistrate, until facts were brought forward for the purpose of destroying it. The intention of the Legislature must have been to dispense with proof in such cases. If this presumption be not sufficient, no Magistrate would be safe, for, however regular his proceedings—however just his decision—unless he could prove affirmatively that he saw the particular deposition before him on which he proceeded, he would be liable as a trespasser. If in this Court one judge were to issue a *capias* upon an affidavit of debt sworn before another judge, could it be said that the

(a) 1 M. & Gr. 267.

judge so issuing it, was subject to an action of trespass, unless he could prove that he had read the affidavit—The presumption in favor of a judge, either of this or of a Mofussil Court, (whom the Act for that purpose places on the same footing) would, in such a case, be, that he had read the deposition which was the foundation of his jurisdiction, and no judicial duties could be safely or properly discharged unless such presumptions were made.

Secondly. The same presumption arises with respect to both the English and Bengali reports as contended for with regard to the depositions. As to the Bengali report, indeed, there is positive proof, the defendant's own signature, dated the 5th of June, being attached to a conditional order written across that very report, bearing internal evidence that the document was before him on the 5th, whereas the warrant did not issue till the 7th. It has been contended that the Magistrate could not issue a warrant on a report unauthenticated by oath, and Reg. XI. of 1796, was relied on. The answer to that is, first, that the 4th section of Reg. IX. of 1807, (a) gives power in all cases to proceed upon such a report without oath ;—secondly, if no such power existed, the absence of an oath would be a mere irregularity of proceeding *inverso ordine*, but would not amount to a total failure of jurisdiction, considering the position of the defendant as a Judge of record ; and this point is conclusively decided in *Calder v. Halkett*.

(a) That section (after providing for the non-attendance and deposition of the complainant himself,) directs that "no warrant for apprehension shall be issued at the instance of a complainant, unless the truth of the charge be deposed to *on oath* (or under solemn declaration) either by the complainant himself or by some other credible person. This shall not, however, be construed to restrict a Magistrate from issuing process to apprehend a person suspected of having committed a heinous crime, or for whose apprehension sufficient cause may appear, upon the report of a police officer, or upon any other credible information."

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The order of the defendant proceeded upon the report of the constable (Higgins) and not upon the depositions taken before Mr. Young. The perwanneh to the constable was dated the 3d of June, 1847. In consequence of the delivery to him of the perwanneh, the constable proceeded to the house of Gasper on the 5th June, at 6 o'clock in the morning. It was then the resistance to process occurred. The constable's report was made the same day. The order of the defendant was written upon that report, and it was dated the 5th of June, and subscribed with the defendant's own initials. It may be objected that the order appeared above the report; but (according to the native custom and the practice of the country Courts) the judge invariably inserts his order *over* the statement of an inferior officer, in proof of his superiority. The order, then, not being over the perwanneh, it is plain that it was not intended to operate on that document, but, on the other hand, as it was over the report, the conclusion is, that the latter was the instrument upon which the defendant acted. And the proof that the order was subsequent to the report is to be collected from the circumstance that the defendant's initials are written *across* the report: for it is not likely that the constable would write across the initials of the Magistrate; but the reverse.

As to the third point—According to the practice of the Mofussil Court in such a case, an order is issued by the Magistrate for the issuing of the summons, and the warrant itself issues upon that order—The order may be made, signed by one Magistrate, and the warrant by another, in the same manner as a writ from the Mofussil Court may, under the Act, be endorsed by a Judge of this Court, so as to render it operative in Calcutta, which it otherwise could not be. It is not, therefore, more essential for the Magistrate, who issues the warrant, than it is for a Judge of this Court, to satisfy himself of the

validity of the previous proceedings. In the case instanced of the writ, neither the Judge nor the Magistrate can be liable as a trespasser, (provided the writ in the one case, or the order in the other, be regular,) by reason of any irregularity in the previous proceedings. Therefore if it be assumed, for the sake of argument, that the defendant had not before him either deposition or report, he would still be justified in issuing his warrant upon the order of Mr. Young; and that such a course would be perfectly regular, the orders of the Sudder show.

Lastly.—This warrant was a judicial order of the defendant, as Judge of a criminal Court, issued with reference to an offence, and against a person within his jurisdiction, as a Mofussil Magistrate. If so, he is protected by the 21st Geo. 3 c. 70 s. 24, and the principle established in *Calder v. Halkett* decides this case in his favor.

[*The Chief Justice.*—Mr. Mytton describes himself as one of Her Majesty's Justices of the Peace in the warrant, and states the plaintiff to have been charged before him in that capacity. Is he now entitled to say that he was not acting as a Justice of the Peace, but in a totally distinct capacity—that of Judge and Magistrate of a Mofussil Court? He cannot justify under the warrant partly as Justice of the Peace and partly as Magistrate. He must do so exclusively as one or the other. There is no evidence to show that his acts were done exclusively in the capacity of Magistrate and not of Justice of the Peace.]

There might be weight in that objection if the defendant were described only as a Justice of the Peace in the warrant—but he is also described as Magistrate, and the seal itself of the Foujdarree Court (the same seal to which respect was shown in *Calder v. Halkett*) is attached to the document, which, therefore, purports to be issued by the

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defendant both as Magistrate of the Mofussil Court and as a Justice of the Peace; and, however erroneous it may have been for him to have acted as a Justice of the Peace, still the warrant would be good so far, as it related to the acts of a Magistrate of the Mofussil. A warrant may be good in part and bad in part: and a justification founded on acts done in pursuance of the good part would be valid, notwithstanding the existence of a bad part, under which nothing was done.

The reason for attaching the signature of the defendant was this. By a recent proclamation, enacted with a view to avoid the trouble and inconvenience of having each Mofussil warrant backed by a Calcutta Magistrate for the purpose of giving it effect within that jurisdiction, the defendant, being a Mofussil Magistrate, was appointed also a Justice of the Peace. A warrant issued by Mr. Young could only operate within the 24-Pergunnahs, but the defendant's warrants could take effect throughout Calcutta. It was anticipated that the party against whom this warrant was issued might remove into Calcutta, and the defendant's signature was attached to the document in question for the purpose of reaching him in that event.

[*The Chief Justice.*—The warrant was signed by the defendant as Justice of the Peace, and the declaratory part of the document recites that the charge had been made before him as such. His intention, therefore, is clear of acting in the capacity of a Justice of the Peace, whose authority flows from the commission of the Crown: in which case it is essential that the evidence upon which the process is based should have been taken before the person issuing it.]

The acts of the defendant, if done as a Mofussil Magistrate, were perfectly legal and correct, and within his

jurisdiction. If the plaintiff had removed into Calcutta, and the defendant had proceeded to act upon his warrant, such acts might have been attributed to his character as a Justice of the Peace; and would (it is admitted) have been invalid. That necessity, however, never arose: the defendant's powers as a Justice of the Peace were not called into requisition, his acts, therefore, were, in reality those of a Mofussil Magistrate.

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[*The Chief Justice.*—The Supreme Court sits under different jurisdictions on its different sides, but it cannot blend its several descriptions of authority in any one proceeding. It cannot support an act by part reference to the jurisdiction peculiar to one system, and part reference to the jurisdiction peculiar to another. Do you contend that the construction of the warrant can be made to depend upon what is done under it; that it is to be construed as a warrant issued by a Justice of the Peace, if executed in Calcutta, but as a Magistrate's warrant, if executed in the Mofussil?]

It is not necessary to contend to that length, although there seems no reason why, if a person has jurisdiction in both capacities, a warrant by him purporting to be by him as both, should not be good in both, or why it should not be executed in pursuance of either jurisdiction, according to the exigency of the case, and as circumstances may require. Supposing one of the judges of this Court, (who by the charter are Justices of the Peace, Coroners, &c. in Bengal) to issue a warrant in a matter where it was doubtful whether the jurisdiction belonged to the Court, or to the individual judge as Justice of the Peace or Coroner, and signed the warrant as Justice of the Peace or Coroner, describing himself also as judge of the Court, affixing the seal of the Court, would he be liable as a trespasser if it turned out that he had full jurisdiction in

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the matter as a judge of the Court, though he had none simply as Justice of the Peace or Coroner? So here; does the warrant become less that of a Mofussil Magistrate, because it professes to be also something more?

[*The Chief Justice*—The difficulty is to ascertain from the evidence, whether, when the warrant was issued, Mr. Mytton intended to act in his character of Magistrate or of Justice of the Peace.]

All the facts, the proceedings in the Magistrate's Court, the depositions and report—the nature of the charge,—the mode of arrest,—the subsequent trial—all show that he both acted and intended to act as Magistrate, and not as Justice of the Peace. The seal of the Foujdaree Court is conclusive evidence that he was acting as Magistrate or judge of that Court: if so, it is quite immaterial whether he was acting in the other capacity as well.

The statute does not confine the protection to those acts of these Courts done by them exclusively in the capacity of country Courts, but provides that no action shall be maintainable in respect of any order whatever made by them; therefore, as this warrant remains an order of the country Court, notwithstanding its professing to be something more, it is within the protection of the statute, so far as the acts done under it were attributable to its character of an order of the Mofussil Court, which was the case here, nothing having been done under it without the limits of the Mofussil. It is immaterial whether the warrant was irregular, or even bad in substance, for unless it ceases altogether to be a warrant of the Mofussil Court, unless it can be shown that it was exclusively a warrant of a Justice of the Peace, it retains its protection, notwithstanding the addition, which is mere surplusage, and perfectly nugatory in the present case.

Then considering the warrant as an order of a Mo-

fussil Magistrate, it is submitted that this Court has no authority to entertain any action in respect of it, as the offence "resistance of process" was within the general jurisdiction of the Magistrate. And if the offence, and the alleged offender be within the general jurisdiction of the judge, he is not liable as a trespasser for any defect in the process on which his proceedings are founded, such as the omission of an oath or formal deposition.

In that view it is wholly unnecessary for the defendant, in support of his justification, to prove that any charge had been made before him, either on oath or otherwise. The decision in *Calder v. Halkett* shows that for acts done within his general jurisdiction, the Mofussil Magistrate is entitled to the same protection as a judge of a superior Court of record in England. No action will lie against a judge for any judicial act done within the general scope of his jurisdiction, however improper or irregular such act may be. This has been established by a long train of decisions from Lord Coke down to the present time. (*In the Marshalsea case, (a) Poole v. Gwynne, (b) Hammond v. Howell, (c) Ackerly v. Parkinson, (d) Doswell v. Impey, (e) Dicus v. Ld. Brougham, (f) in Gosset v. Howard, (g) Taaffe v. Ld. Ch. Justice Downes. (h)* Even, therefore, if neither the deposition, report, or proceeding, before the defendant had been proved at all, there would be a complete defence upon the warrant itself, as being a judicial act within his jurisdiction; and in respect of this he was entitled to complete protection under the statute.

SIR L. PEELE, C. J.—The full discussion which this case has undergone, confirms me in the opinion which I

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(a) 10 Coke, 76.

(b) 2 Lutw. 1556.

(c) 1 Mod. 184.

(d) 3 M. & S. 411.

(e) 1 B. & C. 169.

(f) 6 C. & P. 249.

(g) 16 Law. J. 345.

(h) 3 Moore's P. C. 36.

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entertained and acted on at the trial. The argument against the decision of the Court on the facts appears to me to be based on this, that the Court ought to have made presumptions in support of the jurisdiction of the Magistrate in issuing his warrant, which it forbore to make. It is necessary, in order to clear up some apparent misapprehension on this point, to explain what presumptions the Court declined to make. It was not proved, and the Court refused to presume, that the two reports, or either of them, were the foundation on which Mr. Mytton really issued his warrant of arrest. The report on the paper which bears his initials is plainly inconsistent with the warrant, and it requires the most violent and unwarrantable perversion of the language and plain meaning of that report, to construe it, even by implication, as a report that either of these two plaintiffs had resisted process. The plaintiff in this action is spoken of in that report merely as present, but his mere presence at the service of the process is not imputable as a criminal act, and the complaint is directed against one person only, and that person the defendant in the original matter, who is a different person from either of the plaintiffs. The language of the report describes also the act of that person rather as done contemptuously than as resisting. The order made on that report does not order the arrest of any person in terms, and its language must necessarily be understood as applying to the party for whose appearance a day had been appointed, viz. the defendant in the original matter. This report therefore could not have been presumed to be the foundation of the warrant of arrest. The other report, the English report, was not proved to have been seen by Mr. Mytton. It is in some respects different from the first report, though made by the same person in reference to the same transaction. I could not presume that a Magistrate would issue a warrant for the arrest of a person

as for an alleged criminal act, on such loose statements as these, and I could not presume either to have been the foundation of the warrant of arrest. The warrant besides does not purport on the face of it to be based on either; but on a *charge* made “before me, one of Her Majesty’s Justices of the Peace,” and that warrant could not legally issue on a mere report of a Police Officer; and it would have been presuming an illegal foundation to assume that either report was the foundation of the warrant. Mr. Ritchie contended that the Court ought to have presumed that the depositions were seen by Mr. Mytton. It would have been a singular presumption to make, when it is remembered that it was contended at the trial, that no such sight was necessary by the practice in the Mofussil, and Mr. Clarke’s argument as to the practice supposes an intermediate document between the depositions and the warrant, on which, and not on the depositions, Mr. Mytton would, according to Mr. Clarke’s statement of the practice, act. This presumption, however, if made, would not really advance the defendant’s case.

The only way in which the defendant is connected with the trespass complained of, is by the warrant which he signed; in other words by ordering that alleged trespass to be committed.

The first thing, therefore, to be considered is the nature of that order. In terms it purports to be the warrant of one of Her Majesty’s Justices of the Peace. It is the common printed form of such a warrant, it is addressed in the usual form to J. Higgins and J. Harris constables, and to all other constables and peace officers, it directs the parties addressed to apprehend, by the description therein contained, the two persons who are the plaintiffs in these two actions, whom it describes as “*charged* before me, one of Her Majesty’s Justices of the Peace,” with an assault and resistance of process, and it proceeds to direct them to be brought before him to answer the said

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charge. It is given under the hand and seal of Mr. Mytton, and it is signed by him, prefixing to the printed words "Justice of the Peace" these letters, "Magistrate" and the connecting copulative form, "&c." It is now contended that the Court ought to have disregarded all that shows it to be the warrant of a Justice of the Peace, and to have considered it, for the decision of this suit only, as the warrant of a Judge of the Mofussil Court. Its character as a warrant is consummated when it is signed and sealed and delivered to be acted upon. It cannot be varied as to its nature by the subsequent necessities for its use. The process of a Mofussil Court cannot, *proprio vigore*, be executed in Calcutta. If it be a process of that character, and it is desired to execute it in Calcutta, it must be endorsed by a Judge of the Supreme Court, and be executed by the Sheriff. This course may be occasionally inconvenient, especially in the execution of criminal process, and it may be desired to proceed directly to the arrest of a person charged with a criminal offence, and who is supposed likely to go into Calcutta to avoid process. In such a case, a Judge of a Mofussil Court, being also a Calcutta Justice of the Peace, may think that he can proceed more expeditiously and directly by executing a warrant as a Justice of the Peace. If this be the design, then the instrument must be judged as it purports to be, and the mere prefix of the words Magistrate to the signature, or the use of a seal of a Mofussil Court, no peculiar seal being appropriate to a Justice of the Peace, will not justify a Court in assigning a character to the instrument different from its obvious one, and also its intended one, though it may have been intended also that it should have a double operation, which it could not have so as to be operative as two processes under two different systems of law. The words "charged before me, one of Her Majesty's Justices of the Peace," are equivalent in sense to "charged before me as one of

Her Majesty's Justices. It is the ordinary form of expression in such warrants, embodying the matter, in which the jurisdiction to issue it is grounded. The defendant by his counsel, in substance, insists thus "though I have under my hand and seal said that these parties were charged before me as a Justice of the Peace, though I have ordered them to be brought before me to answer that charge, yet I now say that I have a right to insist, as a Judge of a Mofussil Court, that you will not decide on the legality of that warrant by the law applicable to the warrants of a Justice of the Peace." For an excess or defect of jurisdiction in signing a warrant as a Justice of the Peace Mr. Mytton is equally amenable to the suit of a native, as of a British subject, for the statute applies not to such a case. I shall express no opinion whether he, a British subject, and so subject to the general jurisdiction of this Court, would be liable to be sued by a native in this Court for an act done as a Judge of a Mofussil Court, if it were done in respect of a matter over which he was wholly without jurisdiction. My opinion on the subject would, if expressed, be extrajudicial.

It is clear that the depositions which were taken before Mr. Young, even if communicated to Mr. Mytton, could give Mr. Mytton, as a Justice of the Peace, no legal justification for ordering the arrest of these parties: the warrant does not state that the charge was on oath, or solemn affirmation, and the arrest under it is clearly illegal and actionable. *Caudle v. Seymour (a)* It was urged that a warrant may be good in part and bad in part, and so it may, but its character, whether for goodness or badness, is unchangeable by subsequent events; and it cannot be transmitted to something else, when it does not in its own character furnish a legal justification. The

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predominant intention in issuing this warrant was deducible from its form and operative part. The omission of Mr. Young to issue a warrant on the depositions taken before him corroborated the view I formed at the trial, that it was not really intended to make this arrest exclusively under Mofussil process of arrest. Mr. Clarke admitted, on the argument on this rule, that the real reason why Mr. Young did not execute a warrant was because he was not Justice of the Peace for Calcutta, and that Mr. Mytton executed it, because he was.

The ground of justification and exemption from the jurisdiction of this Court as to the arrest under this warrant, relied upon at the trial, viz. the judicial act of a Judge of a Mofussil Court, wholly fails, when the process, the execution of which is complained of, is shown to be the warrant of a Justice of the Peace. The warrant says they were charged with an assault, but nothing in the nature of an assault appears, for it would be extravagant to suppose that the snatching of the subpœnas under the circumstances stated, out of the hand of his own servant, who is not a complainant, could be tortured into a charge of assault on any one. The authorities quoted by Mr. Clarke show that the Sudder Dewanny Adawlut consider that resistance to process need not amount to a breach of the peace. I do not in the least dispute that. There is nothing, however, in any of these proceedings which I can view as amounting to resistance to process: it nowhere appears that the constable even meditated any subsequent service of the subpœnas, after the delivery of the subpœnas to the sircar, and that he was hindered by his fears of resistance from such subsequent service. A mere contempt of process might, by such latitude of construction, be converted into resistance to process, or graver offence. The conduct deposed to by Higgins would have been very improper and contemptuous, yet in my judgment it would not have been resistance to process. It

appears to me, therefore, that the plaintiffs in both actions, who complain of being arrested, have reason to complain of the act: if they had been arrested under a Mofussil process merely, the propriety and legality of that act could have not been drawn into question here, there being no want of general jurisdiction over the matter or the person; but the process resorted to, intentionally, for their arrest, was one that affords a less ample protection, and they can make that arrest the subject matter of an action of trespass. If this attempt to give to the warrant of a Justice of the Peace a double operation were supported, the consequences might be serious. If such a warrant were resisted in its execution by a British subject, and death ensued, by what law is the Court on a trial for murder to be guided? Could it enter into any question of what was the real as contradistinguished from the apparent intention as to the character of the process, and permit an averment against the instrument under seal in prejudice of the accused? What have the parties who are to act under it, or to yield obedience to it, to be guided by, but its general character? If the warrant chances to be executed *within* Calcutta, is the Magistrate at liberty to say "I claim for it the character of the warrant of a Justice of the Peace; if *without* the local limits, I claim for it the exclusive character of the process of a Mofussil Court?" The preliminary proceedings before a Mofussil Court could not be removed into this Court by a *certiorari*, and by acting as a Justice of the Peace in the concluding stage of a criminal suit, instituted before a Mofussil Magistrate as such, by mingling process under the English law of execution or process of arrest, in the nature of *mesne* process, with preliminary proceedings purely of a Mofussil Court, the course of justice in the Queen's superior Courts might be embarrassed with difficulties, and the security which the subject enjoys against any abuse of the process which ope-

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rates under the English law might be impaired. The practice of the Mofussil Courts was much insisted on at the trial of this cause. I have not the slightest intention to draw into question here the legality of the practice of such Courts, as to the process of a Mofussil Court; but nothing short of a legislative enactment can alter the law, which prescribes the limitations under which criminal process of this sort, operating under the English Law, can legally issue.

GRANT J.—This was an action of trespass and false imprisonment brought against Mr. Mytton, a Magistrate of the Company's Court, the Foujdarry Adawlut of the 24-Pergunnahs in the Mofussil, which borders on Calcutta, and Justice of the Peace in the Mofussil and in Calcutta also. It appears that there was a suit instituted in the Foujdarry Court of that zillah by one Gouse Mullick, against a person described as Malcolm Gasper, Sahib, inhabitant, &c.; and a summons was issued by the defendant to appear, not before himself, but before the "assistant Sahib," (meaning the Assistant Magistrate, Mr. Young.) The suit continued, and various proceedings of a singular description were had before Mr. Young. Had these proceedings, however, whatever opinion I may entertain of them, been under an order, or constituting a judgment, decree, or order of any person exercising a judicial office in any country Court in India, I, as a Judge of this Court, should have no jurisdiction in the matter, there being no evidence that the plaintiffs were not personally subject to the jurisdiction of the Foujdarry or Criminal Court (a country Court of the East India Company), but it being, on the contrary, well known, and not disputed, that they were so. Nor in this case would my learned colleagues have had jurisdiction to try the action, or find a verdict against the defendant. It is evident that this limitation of the jurisdiction of this Court

exists only when the officer of the country Court has acted as such officer in the case of a matter, and a person, in which, and over whom, he had jurisdiction. In any other case he is not acting as such officer, and, if a British subject, he is liable to the jurisdiction of this Court. It is equally clear that if the warrant, issued by the defendant, were issued by him as one of Her Majesty's Justices of the Peace, by virtue of Her commission, the jurisdiction of this Court to entertain an action against the defendant for trespass and false imprisonment, in issuing the warrant in question and apprehending plaintiff, is indisputable.

The question of jurisdiction could not, therefore, be determined till the trial, a circumstance which must always happen when the jurisdiction depends upon matter of fact.

The defendant pleaded the general issue under the statute, giving the special matter in evidence, of which special matter part was, that he was a Magistrate of this *country Court*, and that the process or warrant was an order issued by him in that character. It was necessary, therefore, for my learned colleagues as a jury, to decide, in the first instance as matter of fact, whether the process was issued by defendant in that character, or as one of Her Majesty's Justices of the Peace, before they could proceed to investigate any other matter given in evidence by way of justification; provided they were of opinion that the issuing of the order was proved, and this was not disputed.

My learned colleagues must, therefore, have found, as matter of fact, that the warrant was issued by the defendant, in his character as one of Her Majesty's Justices of the Peace, under the authority conferred on him by Her commission. Now this commission gives and can give no authority to act according to the rules and laws prescribed to their country Courts by the government of the

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corporation of the East India Company in criminal matters, but according to the laws of England. My learned colleagues, therefore, having decided the fact that the defendant acted as a Justice of the Peace under the Queen's commission, it only remained to decide whether the issuing of this warrant was justified by the laws of England; and they decided that it was not.

The questions I have to consider upon this rule are therefore two—1st, Whether my learned colleagues were wrong upon the matter of fact, viz. that the defendant had issued the warrant in his character of Justice of the Peace, which gave the Court jurisdiction?

And 2ndly, If they were not wrong in this—whether the issuing of the warrant was justified by the laws of England?

It is quite clear that defendant could not perform one and the same judicial act partly as Justice of the Peace, under the Queen's commission, and partly as Judge or Magistrate of a country Court, under the commission of the E. I. Company's Government, because the powers proceed from wholly different authorities, which authorities command their officers to conform themselves to wholly different laws and usages.

The E. I. Company's Government cannot modify or vary the powers or duties of Her Majesty's Justices of the Peace, neither has Her Majesty, by her prerogative, or by consent of Her Parliament, attempted to modify or vary the powers and duties of E. I. Company's officers in the country Courts. And nothing could be more unjust or more monstrous than that a Magistrate should issue a process in one character, and (finding he could not justify it by the law binding his acts in that character,) should be allowed to turn round and attempt to justify it by a law, applying only to acts which might be performed by him in another character, in which he had not acted on that occasion.

In this way the jurisdiction of Her Majesty's Courts in India over Her Justices of the Peace in India, might be ousted in all cases in which such Justices of the Peace happened also to be Magistrates or Judges of any of the Company's country Courts. Now, it appears to me that nothing can be clearer than that the warrant in question, under which the plaintiff was apprehended, was issued by defendant in his character of one of Her Majesty's Justices of the Peace, by virtue of the authority conferred by Her commission, and in this character, and under this authority only, and was so understood by defendant himself.

1st. The warrant is addressed in the usual form to the officers charged with the execution of warrants issued by Justices of the Peace.

2nd. It appears that the persons to be apprehended were charged "before me, one of Her Majesty's Justices of the Peace."

3rd. The offence stated is one for which, by the law of England, the parties might be indicted before a competent Court, and properly apprehended and committed, or held to bail till trial by a Justice of the Peace.

An argument was attempted to be founded on defendant's having prefixed to his designation of Justice of the Peace, printed under his signature, the letters "Magistrate, &c." But a Justice of the Peace is a Magistrate, and he does not describe himself as any otherwise a Magistrate, if he did that would not render him less a Justice of the Peace, and he could not act in a double capacity, nor could he, by any assertion or contrivance, issue a warrant as Justice of the Peace, with the intention that it should have the effect of a warrant by a Justice of the Peace, reserving the right to justify it as a warrant of a Magistrate of a country Court, if he found it unjustifiable as the warrant of a Justice of the Peace, by the law which Justices of the Peace are bound to conform to.

Again, it was argued that the seal affixed to the do-

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cument is that of the Foujdarry Court. But this proves nothing. A Justice of the Peace may validly use any seal, as his seal for that occasion, or a wafer without any stamp. It has been decided that a warrant of a Justice of the Peace, requires no seal, (Bul. N. P. 83: Edtns. 1781 and 1793, and this is cited as Law, 4 Burn's J. P. 487, T. Warrant, Edtn. 1800), neither can it control the express declaration in the body of the warrant, that the charge was brought before defendant as a Justice of the Peace. All it could prove, (if any thing) would be a dishonest intention of having (if necessary) two strings to the bow. Be this, however, as it may; there is a seal here, and its bearing the inscription it does cannot control and falsify the defendant's own assertion, written on the warrant, "given under my hand and seal," declaring that the seal was used by him as his seal on that occasion. He cannot be permitted to falsify his own assertion. Suppose instead of this seal he had used the coat of arms of a friend who was sitting near him, this would not have rendered it his coat of arms, but it would have rendered it his seal *for that occasion*.

That this warrant, therefore, was issued by the defendant as Justice of the Peace, acting under the laws of England, and can be justified only by those laws, is beyond dispute. As a question of fact, decided by my learned colleagues as a jury, I should have some difficulty in dealing with it, if I doubted the conclusion they came to, they having heard that evidence which I did not; but I entertain no doubt at all, and should have concurred in the verdict, if I had been present. I think defendant's plea, indicates that he considered himself acting as a Justice of the Peace. It is *not guilty under the statute*; under which statute only he could, as Justice of the Peace, plead the general issue, and give the special matter in evidence, which is the course that he has adopted.

Upon the 2nd question, whether this warrant can be justified by the laws of England as the warrant of a Justice of the Peace—I apprehend there can be no doubt that it cannot. It is quite needless to refer to modern cases for propositions in the law as old as the Institutions to which they relate.

1st. A Justice of the Peace cannot grant a warrant without having a charge or information before him upon oath.

2nd. He cannot cause any one to be apprehended on depositions not taken before himself. Both these propositions were so decided in the late case of *Caudle v. Seymour*, cited by the Chief Justice. In this case there was no charge made on oath, and no depositions but those taken before Mr. Young in the absence of the defendants. It does not appear the defendant ever saw these, but whether he did or not is immaterial. Presumptions were suggested at the Bar in order to support these proceedings, but no *presumptive* proof, can be received in a case affecting the liberty of the subject. The presumption of *omnia rite acta* has no place in the judicial proceedings of Magistrates (7 Barn. and Cres.) and this is so laid down there by Mr. Justice Holroyd without any dissentient voice.

I do not go into the question of the course of proceeding in this country Court. That is not a question here, and if it were, we have not jurisdiction to entertain it. I think, therefore, the rule must be discharged with costs.

Rule discharged.

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*Pleading—counts
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Gen. Hil. T. 4. W. 4.
r. 6.*

A plaint on Union Bank Post Bills contained counts, describing the instruments in one set as Bills of Exchange, and in another as Promissory notes :—Held that these counts were not in apparent violation of the Pleading rule 6. of Hil. T. 4. W. 4. and ought to be allowed.

THIS was an action commenced against the defendant as a public officer and Secretary to the Union Bank of Calcutta, under Act 23rd of 1845. The plaint contained two sets of counts upon the same instruments. In the first set the plaintiffs declared as indorsees of the instruments in question, describing them as bills of exchange, and in the other set, they were described as promissory notes. The particulars showed that the plaintiff sued upon one class of instruments only.

A rule was obtained calling on the plaintiff to show cause why one set of counts should not be struck out, as being in contravention of the new rules of pleading. (a) These documents were similar to each other, with the exception of dates and amounts : the following is a copy of one of them :—

UNION BANK POST BILL.

Calcutta, July 1st 1849.

No. 429, Co.'s Rs. 10,000.

At 60 days sight of this first Bill of Exchange (second and third of the same tenor and date not paid) we promise to pay, on account of the proprietors of the Union Bank of Calcutta, to the order of Messrs. Cockerell, Larpent, and Co. the sum of Co.'s Rs. 10,000.

J. RENNIE, }
W. P. GRANT, }*Directors.*

To H. W. ABBOTT, *Secretary.*

(a) Hil. T. 4. W. 4. rule 6.

Mr. *Prinsep* and Mr. *Ritchie* now showed cause. In ascertaining whether counts founded on the same contract, are in apparent violation of the rule, the principle appears to be, that where there is one clear contract, there ought to be but one count in respect of it; but the construction of the rule will not be so rigid where the contract admits of a doubtful and double interpretation. In one sense these instruments profess to be promissory notes, but on the face of them they purport to be bills of exchange, and indeed they are so called. It is submitted, that where documents are sent forth to the world, couched in such ambiguous terms as these are, the Court will not compel a party suing on them to make his election, but will, under the circumstances, allow the plaintiff to declare so as to treat them in the alternative either as bills or notes, *James v Bourne*. (a) In the present case the contracts may be construed either as bills or notes; we have therefore declared on them in one set of counts as contracts *different*, in fact, from those stated in the other set. Moreover it is essential to retain both the sets, in order to meet one of the defences anticipated. It is questioned whether the Bank had power to issue such instruments, and the authority of the parties signing so to do, will be disputed at the trial. (b)

Mr. *Morton*, contra.—The plaintiffs are not entitled to sue on these instruments, so as to frame their case with a double aspect. They must make their election whether

(a) 4 B. N. C. 420.

less than eight rupees and not

(b) The first section of the Act refers to the deed of partnership, and recites that it was thereby provided that the business of the company should consist in issuing promissory notes payable to bearer on demand for any sum not

exceeding £1,000; and bills of exchange, payable at such time or sight as the directors for the time being might fix, to parties who should require the same, and deposit the amount of such bills in the bank, &c. &c.

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they will proceed on them either as promissory notes or bills of exchange.

The case of *Dickenson v. Valpy* (a) is an authority to show that these are promissory notes, but of course the Court is not called upon at this stage to interpret their construction. The rule against several counts is thus expressed "several counts shall not be allowed, unless a distinct subject matter of complaint is intended to be established in respect of each;" "counts founded on one and the same principal matter of complaint, but varied in statement, circumstances, or description only, shall not be allowed." The words of the rule seem to apply precisely in this case, where it is admitted that there is but one class of instruments, which form the subject of the action. One of the chief defences is want of authority.

[*The Chief Justice*—We should not be disposed to strike out these counts, unless the defendant will undertake not to raise the objection as to the form].

Mr. *Morton*. The want of authority to draw such instruments as these whether bills or notes, is a material defence.

SIR L. PEEL, C. J.—The new rules were never intended to apply to a case like this, where a plaintiff is in doubt as to the real construction of the contract. (b)

Rule discharged.

(a) 10 B. & C. 128.

(b) See *Sheppard v. Hales*, 13 Law, J. Exch. 333, where a declaration on bills of exchange, contained counts founded on the

lex mercatoria, on the law of France, and on special contract between the parties; and which were allowed.

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DEMURRER to the plaint, which was on the case, and stated that the defendant at the time of the committing of the grievances &c. was master of the ship or vessel called the Earl of Hardwicke bound from London to Calcutta and that being such master as aforesaid at his request had the care and custody in and on board the said ship of a pier glass of the plaintiff of the value of Co.'s Rs. 1,000 to be carried and conveyed by the defendant in and on board the said ship from London to Calcutta and there to be delivered to the plaintiff (the act of God, &c. &c. excepted) for freight and reward payable in that behalf and it then became the duty of the defendant to take due and proper care of the same &c. : yet the defendant not regarding his duty in that behalf did not nor would whilst he so had the care and custody of the said pier glass take due and proper care of the same but so negligently conducted himself in that behalf that by and through the improper stowage and careless conduct of the defendant in conveying the same the pier glass was broken and destroyed, &c.

Demurrer assigning the following causes. That although the plaint professed and was intended to be for and in respect of an alleged breach of duty by the defendant as a common carrier by custom of the realm it did not sufficiently or at all show any relation or character of the defendant or any undertaking or employment or conduct of the defendant creating such a duty or from which it could legally be inferred; nor did it show whether the alleged damage was occasioned by misfeasance or by nonfeasance of the defendant or both; that the allegation in the plaint "that the defendant being such master at his request had the care and custody in and on board of the said ship of goods" the subject of the

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Monday.

Pleading—Master of ship—bailment averment of—

The plaint stated that "defendant being master of a ship, had the care of a certain chattel for safe conveyance therein." *Held*, on demurrer, a sufficient averment from which the defendant's duty, as a common carrier might be inferred.

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action although apparently intended to be was not in law and according to the rules of pleading equivalent to an averment of the delivery to and receipt of the goods by the defendant in the capacity of a carrier so as to fix him with the duty to the plaintiff in the plaint subsequently averred; and even if such allegation were substantially equivalent to the usual averment of delivery to and receipt by the defendant as master of a ship to carry and convey and deliver yet the allegation was vague insufficient uncertain and argumentative and not in a distinct and traversable form; that it was not positively stated nor did it appear by necessary inference how the alleged duty arose or how the plaintiff was entitled to complain of a breach of it; that the plaint contained no words or statement importing a promise of the defendant to perform the alleged duty nor any statement of facts from which such promise or duty could be legally implied: that it did not appear how or why or under what circumstances the defendant had the custody of the said goods whether or not from or on account of the plaintiff or whether or not before or from the commencement or during any voyage or whether under any contract with the plaintiff or with any person whatever or whether by bailment or delivery at all nor whether rightly or by wrong nor whether any voyage was performed or commenced: that although the alleged cause of action was really and in law founded upon contract and upon a duty arising out of contract yet no contract sufficiently or at all appeared; nor did the facts stated necessarily show any privity by contract or otherwise between the plaintiff and the defendant so as to raise a duty from one to the other; nor was it shown how in respect of the plaintiff or of the goods of the plaintiff defendant became or was a common carrier or liable for the duty alleged. And lastly that the plaint was a novelty in form and without precedent and a mischievous innovation in pleading.

Mr. *Montriau* in support of the demurrer. This form of declaring is a novelty, and is purposely introduced and intended to fit a defective state of the plaintiff's evidence. No contract is stated, nor are any facts set out from which a legal duty is necessarily to be inferred. The averment is "that the defendant being master of the ship had the care and custody of a certain chattel to be carried and conveyed &c. by him." On the mere fact of possession, then, is the liability of the defendant founded, and every imaginable mode of taking or obtaining possession, whether accidentally, fraudulently, by bailment, or special contract, would be consistent with this allegation. But the mere fact of possession by a shipmaster does not make him liable to an action for nonfeasance or negligence by the owner of the cargo, unless some legal privity be established between them. Suppose the defendant came to possession of the goods by wrong; or the bill of lading had been signed by another captain, there would be no privity of contract between the defendant and the consignee, or owner of the goods. This plaint assumes that proof of the plaintiff's possessory right, of the fact of defendant being master of the ship, and of the goods being on board, would suffice to raise the common law liability. If the averment is to be read and construed as a statement of delivery and receipt to carry, it is indefinite and argumentative, and is not in a traversable form.

[*The Chief Justice.*—Suppose a thief steal the goods of A. and in making his escape with them, entrust them to a carrier by whose carelessness they are lost or injured—cannot A. sue the carrier?]

It is submitted he could not, at least in this form of action: but if such an action could lie, it would be upon an implied bailment from A. to the carrier; the law giving

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A. the privilege to waive the tort. *Morse v. Slue* (a) is the first reported case, which decided, that a shipmaster was liable upon the custom as a common carrier; there however not only the custom, but the delivery is stated. It has since been held unnecessary to state the custom, but the averment of a bailment has never been dispensed with in any case. *Dule v. Hall* (b) was the first case of an assumpsit; but that form of declaring was permitted expressly on the ground that the duty (whatever the form of action) clearly arose out of contract. That view is supported in *Max v. Roberts* (c) and *Elsee v. Gateward* (d) Mr. Baron Park, in *Wyld v. Pickford*, (e) which was an action upon the common law duty of a carrier, observes "In an action on the case for breach of duty arising ex contractu, upon a bailment or otherwise, it is not necessary to state the contract with the same form as in an action of assumpsit. The usual mode is to aver, as is done here, that the goods were delivered by the plaintiff to the defendant, and had and received by the defendant to be kept or carried or dealt with in a particular way." Here no delivery to defendant is stated at all; nor could evidence to that effect be given at the trial. Lord Holt defines the liability of a carrier upon the custom as a bailment; and a bailment is only a contract, *Coggs v. Bernard*. (f) It would seem from the introduction of the "request" that the plaintiff relies on some special contract; if so it ought to have been specially set out, as in *Walker v. Jackson*. (g) The decision as to a plea in abatement in *Ansell v. Waterhouse*, (h) contradicting as it does, more solemn decisions even on the point of pleading, cannot controvert the proposition that this duty arises out of a contract express or

(a) 1 Vent. 190.

(b) 1 Wils. 281.

(c) 1 East. 89.

(d) 5 T. Rep. 143.

(e) 8 M. & W. 458.

(f) Ld. Raym. 918.

(g) 8 M. & W. 443.

(h) 2 Ch. 2.

implied ; and which, that is to say, the *character* of the bailment, must be set out by positive and traversable averments.

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Mr. *Ritchie* contra. The objections to the plaint are not tenable. It was intended to charge the defendant as master, although a change of masters had actually taken place subsequent to delivery to the first captain. It is submitted, that the plaint discloses a complete cause of action against the defendant. All that is necessary in such an action, is to state a series of facts, from which a duty may be implied by law, and a liability arising in consequence of a breach of that duty. The duty alleged here is, "that the defendant for reward in that behalf undertook to carry and convey safely." The question is whether that duty is sufficiently alleged, or can be implied. The duty alleged is certainly not larger than what the law would imply, and is such as is incidental to the character of a master of a ship. The fact of the master having the care and custody of goods on board his ship for the purpose of conveyance, is sufficient, both in law and in common sense, to impose on the master, the duty of taking reasonable care of them, whether he received the goods from the plaintiff himself, or from any other party, or whether rightfully under contract, or wrongfully. If, as here stated, the party so entrusted with the care of goods is guilty of such negligence as to cause or permit their destruction, he is clearly liable to the owner of them, in whatever mode he originally acquired the possession of them. The demurrer designates this as a mischievous innovation in pleading ; so far from that, the very form is adopted in Chitty. (a) In *Govett v. Radnidge* (b) the duty implied was founded precisely on facts similar to those in the present case, and

(a) Vol. 2 p. 251.

(b) 3 East. 62.

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are similarly stated. *Ross v. Hill* (a) and *Pozzi v. Ship-ton* (b) are also authorities in favor of this form of pleading. It has been contended on the other side that no duty arises from the facts alleged in the plaint: surely the law would not support so absurd a conclusion, as that, because there has been a substitution of bailees, subsequent to delivery of a chattel to the first, the substituted bailee is wholly irresponsible. There is no more difficulty in traversing the averment of the possession by the defendant than there would be in traversing the delivery of the goods to him (if that averment had been introduced.) The mode in which possession had been obtained would have amounted to mere matter of evidence. It is quite enough to state an averment of the goods having been in the care and custody of the defendant for the particular purpose, (from which statement a duty can be inferred by law) and then a breach of that duty; for the liability arises without any privity of contract whatever.

Mr. *Montrieu* in reply. The count in Chitty is given as a fourth count, and as experimental only: it answers the pleader's purpose unless demurred to; which is the case here. None of the cases quoted were decided on demurrer, nor do they furnish any precedent to entitle the plaintiff to maintain this form of plaint. It is admitted that this form of allegation was adopted in order to preclude an objection arising on the bill of lading; if so, still stronger reason is there that the character of the liability should distinctly have appeared upon the record, instead of this averment of a mere legal result.

SIR L. PEEL. C. J. I am of opinion that this demur-
er must be overruled. The plaint is not in an unusual

(a) 15 Law, J. 182 C. P.

(b) 8 A. & E. 96.

form, and is well enough suited to the circumstances to which it is to be applied. The argument in support of the demurrer appears to me to militate against first principles: the duty of a common carrier arises most frequently out of contract, and for a breach of that duty an action on the case may be maintained, as for a tort based on contract, but it is quite fallacious to say that a contract is therefore of the essence of the liability of such a person. A comparison of the case of *Govett v. Radnidge* with those in the Common Pleas and that of *Brotherton v. Wood* (3 B. and B. 54) before the judges in the Exchequer Chamber, should of itself have sufficed to dissipate such an error, and to show that the action may be founded on the custom of the realm. The Court of Common Pleas merely insisted that when the transaction was really founded on contract, the party should not be allowed to escape from the incidental obligations of contract as to the joinder of parties, and so forth, by changing his form of action into one *ex delicto*. The owner of a stage coach is a common carrier, as is the owner or captain of a ship. In certain cases there may be a possession in fact by a common carrier in that character of the property of a person between whom and himself no privity of contract whatever exists. For instance suppose the owner of a stage coach himself to be driving it, and that a burglar who has just robbed the house of A. and has some of the stolen property in a parcel in his possession, mounts the coach with it as a passenger, and entrusts the parcel as luggage to the care of the driver. In such a case there is no contract whatever between the owner of the property and the owner of the coach, either in fact or law: for nothing can be more unfounded than the proposition advanced at the Bar, that in such a case, if a damage ensued to the property, by careless stowage or otherwise, the owner of the property must work out his remedy by the fiction of a contract

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effected between himself and the owner of the coach, through the medium of the thief. It is equally fallacious to say that trover or detinue would in such a case be the solely appropriate remedies. If the property was returned to the owner though damaged, detinue would not lie, and mere damage alone would not (except in some special cases) amount to a conversion so as to maintain trover.

If the liability of a common carrier or his servants to be sued for negligence were founded on contract solely, the right of action could not extend further than the privity of contract, that is, the actual doer of the mischief could not be amenable to the suit of the sufferer by his negligence, unless they were contracting parties towards each other, *Winterbottom v. Wright.* (a)

It would follow that the coachman of a stage coach, the servant of the owners, could not be answerable in an action of tort for his negligence, for there is no privity of contract between one of two contracting parties, and the men servants of the other contracting party. The coachman is no contracting party whatever with the passenger: for there is no consideration whatever from the passenger moving to him, his chance of a gratuity in certain cases amounts to no consideration between them.—If one of the coachmen in the transit upsets the coach by his careless driving, the passenger may sue him, in case, if he thinks him worth suing; his remedy extends to the owners, who are answerable for the misconduct of their servant, but their servant is not exonerated from liability to the sufferer by his tortious conduct, because his misconduct by law involves his masters in that liability. The inferior agents in torts, not based on contract, are not exempt from that responsibility to the sufferer in which their misconduct involves their principals. The rule of “respondent superior,” is for inclusive, not exclusive

(a) 10 M. & W. 109.

purposes, to perfect the remedy in favour of the sufferer, (*Michael v. Alestree & anor* (2. Levinz): a case of joinder of master and servant as defendants in one action for the actual misconduct of the servant.)

In the present case, if the facts be as stated at the Bar, the pleader wisely resolved not to embarrass the case with such questions, as whether upon every change of the master of a general vessel a new contract springs up between the new master and the shipper of goods; he avoids contract altogether, as the basis of his action of tort, and he says, you were the captain, that is a common carrier; as such, you had the care of my looking-glass, it was your duty to take care of it, you neglected that duty, and I have suffered damage by your neglect: hardship on the defendant there can be none resulting from this simple and truthful adaptation of his plaint to the fact. If the goods were not under the care of the defendant, he will deny that averment: if he were not negligent, he will deny the negligence imputed to him; if the plaintiff cannot prove both, he will fail: if he prove both, reason and law, which are here happily in unison, require that he should make reparation.

Demurrer overruled.

Note.—This case was subsequently tried before Sir L. Peel, C. J. and Buller, and Colvile, J. J. The defendant pleaded not guilty, and secondly, that the defendant had not the care and custody of the goods. *Mr. Morton* and *Mr. Ritchie* for the plaintiff, *Mr. Taylor* and *Mr. Peterson* for the defendant. A verdict was returned for defendant; on the ground that the evidence failed in shewing that the damage accrued during the period of defendant's command of the vessel, he having succeeded the first captain after stowage of the goods on board.

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BRADDON and others v. ABBOTT, Secretary, &c.

*Union Bank—
Post bill—signature
form of—author-
ity to draw—rights
of bona fide holders.*

Assumpsit on post bills in the following form. "Debit U. B. post bill account, U. B. post bill, Co.'s Rs. 10,000. At 60 days' sight &c. we promise to pay on account of the proprietors of the U. B. to the order of Messrs. C. L. & Co. Rs. 10,000, J. R. — W. P. G. Directors." The above was addressed to the Secretary and countersigned by the Deputy Secretary, *Held*—in form—the note of the Union Bank, and not of the parties signing.

The partnership deed of the U. B. limited its paper circulation; the deed however, had been constantly violated in this respect. *Held* that, as issuing post bills came within the scope of the ordinary business of the Bank, a bona fide holder for value of U. B. post bills without notice, (even in the absence of evidence of usage) was bound only to consider the apparent authority of the Bank to issue them, and was not affected by excesses of authority arising out of violations of the partnership deed.

ASSUMPSIT on six Union Bank post bills.—The plaint contained two sets of counts, varying the description of the instruments declared on; in one set they were described as bills of exchange and in the other as promissory notes; and also a count upon an account stated. The instruments were in the following form:—

Debit Union Bank Post Bill account.

UNION BANK POST BILL.

	Calcutta,	} 1st July,
No. 429.	Co.'s Rs. 10,000	

At sixty days after sight of this our first Bill of Exchange (second and third of the same tenor and date unpaid) we promise to pay on account of the proprietors of the Union Bank of Calcutta, to the order of Messrs. Cockerell, Larpent and Co. the sum of Rs. 10,000 (rupees ten thousand) value received.

	J. RENNIE,	} <i>Directors.</i>
H. W. ABBOTT,	W. P. GRANT,	
<i>Secretary.</i>		

Across this was the acceptance of Mr. Hay, the deputy secretary of the Bank, dated 25th Oct. 1847: the notes also bore the protest for nonpayment, dated 27th Dec. 1847, and the following endorsements:

"COCKERELL, LARPENT AND Co."
 "JOHNSON, COLE AND Co."
 "Pay to Messrs. BAGSHAW AND Co."
 R. J. BAGSHAW."
 "BAGSHAW AND Co."

At the trial the following facts were proved :—

The Union Bank was an institution established in 1829, as a private joint stock association for the purpose of conducting banking operations. In 1839 a new deed of co-partnership was drawn up and executed, containing in some respects materially different and important alterations, and new conditions not specified in the first. By Act XXIII. of 1845, the Union Bank was incorporated : the partnership deed was not made parcel of the act, but the preamble of the 1st section, after reciting the 1st, 4th, and 8th sections of the partnership deed (a) proceeded

(a) The preamble was in the following form :—

“Whereas by and under a certain deed of partnership or association or an agreement in writing of that nature bearing date the first day of August 1839, several persons have formed themselves into a certain company or co-partnership by the name of “The Union Bank of Calcutta,” by which said deed or agreement it was and is provided (amongst other things) that the business of the said company should consist in issuing promissory notes payable to bearer on demand at their office in Calcutta for any sum of not less than eight company’s rupees and not exceeding one thousand Company’s Rupees ; and bills of exchange payable at such time after date or sight as the directors for the time being should fix to parties who should require the same and deposit the amount of such bills in the said Bank, which deposit should bear interest at such rate as

the Directors should fix : and also in discounting bills and promissory notes not having a longer period to run than four months from the time of discounting the same respectively : and also in lending money on the security of personal property for any period not exceeding four months or in cash accounts to persons depositing undoubted security such accounts to be settled at the end of every three months and in all other branches of business usually transacted by bankers in Calcutta ; and by which said deed or agreement it was and is further provided that the capital stock and fund of the said company should amount to the sum of 10,00,000 of Company’s rupees with certain provisions for increasing the same when and if it should be deemed expedient. And whereas difficulties have arisen and may hereafter arise in recovering debts and monies due to the said company called “The Union Bank of Calcutta,”

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in substance as follows, viz. "whereas difficulties have arisen in recovering debts due to the Union Bank and in maintaining actions &c. therefore for obviating and removing the difficulties aforesaid—It is enacted &c." directing that the secretary or treasurer should be the nominal plaintiff or defendant. The commencement of the practice of issuing these post bills was traced to 1840, from which time they had been inserted as a regular item in the half-yearly accounts, being made the subject of resolutions passed by proprietors, and forming one source of the profits upon which dividends were paid. Reports had been presented to shareholders for a series of years, in which these instruments, with the number then outstanding, were specified, as well as the amount of profits arising from their circulation, and the dividends proceeding from those profits: the resolutions sanctioning the dividends, and the calculations and statements of the directors regarding the post bills had all been made the subject of remark and information, though never produced and shown at their half-yearly meetings, (which were previously advertised in the newspapers,) and in no instance had any suggestion been offered by any proprietor, to the effect that the securities were not those of the Bank. In addition to the above uniform course of conduct through a series of years, notices had been advertised, in the Exchange Gazette, the directories, and all the bank-books issued to constituents, to the effect that Union Bank post bills were to be purchased on certain

and in maintaining actions for damages done to the same company or to the property of the said Union Bank since by law all the members for the time being of the said company must be named in every action or suit carried on for such purpose. And whereas it would be convenient that persons having demands against the said company should be entitled to sue one of the two officers hereinafter mentioned or described in that behalf therefore for obviating and removing the difficulties aforesaid —It is hereby enacted," &c. &c.

terms. They were invariably signed by two directors, countersigned by the secretary, and sighted or accepted by the secretary or deputy secretary, and after such acceptance always duly paid. The money arising from the bills was appropriated to the use of the Bank, in every case, when issued on the Bank's account; sometimes they were sent to England. In 1840 bills to the amount of 10 lacs were transmitted to London, having been issued on money deposits or adequate security, and used as collateral security for bills on London sold by parties in Calcutta: between 1843 and 1847 post bills to the amount of nearly a million sterling were issued; and between April 1847 and December of the same year the Bank's broker transacted post bills operations to the extent of 100 lacs. In 1844 the proprietary body consisted of 500 or 600; about one-third were usually in Europe, and a considerable number, not amounting to one half, were absent in the upper provinces, or in other parts of the world: some of the shareholders had been absent for many years from Calcutta, although still belonging to the proprietary body. The statements of accounts published in the newspapers in Calcutta, together with the reports, were always transmitted by the Bank to all the absent shareholders, unless by unintentional omission or accident; every meeting of ordinary interest was well attended, perhaps by from 50 to 100 persons: the attendance, however, of course, depended upon the state of public feeling, and the interest taken at the particular time in any particular question to be debated.

For the defendant, at the trial a nonsuit was submitted on the following grounds. First—that these documents in points of form disclosed no legal obligation on the part of the Bank. Secondly—that no proof was shown of any authority on the part of the directors to bind the shareholders of the Bank by documents in this form. And thirdly—that the evidence given of ratification was of

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no avail in an action against a fluctuating body, such as the proprietary of the Union Bank, having authority by act to sue and be sued through its secretary. A verdict was given for the plaintiff upon the counts describing the instruments as promissory notes, with interest: and for the defendant on the counts in which they were described as bills of exchange; as also upon the count on an account stated no evidence in support of the latter having been offered. Leave was reserved to the defendant to move generally.

A rule having been accordingly obtained, calling upon the plaintiff to show cause why the verdict given for the plaintiff should not be set aside, and a nonsuit or verdict entered for the defendant, or why a new trial should not be had on the ground of misdirection,—

March 30th.

Mr. *Prinsep*, Mr. *Cochrane*, and Mr. *Ritchie*, showed cause—The rule resolves itself into two grounds. First, that these instruments are insufficient in form, and do not on the face of them sufficiently import a promise by or on behalf of the Union Bank; and secondly—that there is no evidence of authority to issue these documents, nor any ratification, by the entire body of shareholders.—First, as to the form, the objection is that the form is ambiguous: but ambiguity must be construed against the party making such instruments. The heading is a remarkable feature in these notes: the words “Union Bank post bill” amount to an absolute acknowledgment that they are instruments drawn by the Bank on their own account, and for their own benefit. The post bills both of the Bank of England, and that of Bengal, are similarly headed, with this difference, that in the former the document purports to be “for” the governor &c. and in the latter “for” the trustees, &c. [*The Chief Justice*—A corporate body cannot change its designation. The form of a Bank of England note is invariably “for the governor &c.” and great strictness is required in using that form only.] The first section of

the act expressly mentions bills of exchange, which would include bills of this nature; nor would the fact of the money not having been actually paid in beforehand, vitiate the transaction. In the older acts no distinction was drawn between bills of exchange and promissory notes; they were considered as synonymous. [*The Chief Justice*—A bill of exchange must be addressed to some one; without such address it would not be a bill of exchange.] These may be treated as either one or the other. The condition that the money must be paid in may be and has been dispensed with continually. These notes may also be considered to come within the words “all other branches of business usually transacted by bankers in Calcutta.” Bank post bills were the very origin of banking business amongst the scriveners and goldsmiths of England. They took deposits and gave bills bearing interest. The heading, then, of these instruments must be considered, to all intents and purposes, a signature, and the terms of such signature especially indicate them to be those of the Union Bank, bearing also, as these notes do, the names of the directors and secretary of the Bank. If an action had been brought against a director thus signing, he might have contended, that this was a note of the Bank, of which he was the mere scribe, having inserted his name simply for the purpose of giving validity and authenticity to the instrument. The contest on the other side is that there is a difference between signing on behalf of a person to pay, and signing to pay on behalf of a person. Now if these words do not bind the Bank they would be utterly useless and inoperative; but they were not introduced as superfluous and unnecessary words, for the notes on the face of them show that they are Union Bank promissory notes. The words “on account of” may, and should be read “for” (*Ld. Gahway v. Mathew (a)*, *Downman v. Jones (b)*) and the words “I pro-

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(a) 1 Camp, 403; 10 East 264 (s. c.) (b) 14 Law J. 226.

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mise to pay" constitute a well understood mercantile expression. The case of *Hall v. Ashurst* is distinguishable from the present; that was an instance of an attorney corresponding on behalf of a number of unascertained creditors, and making himself personally responsible. On this point they also cited, *Anderson v. Bank of England (a)* and *Booth v. Bank of England (b)* *Eaton v. Bell (c)* *Bank of Scotland v. Watson. (d)*

Then as to the second point—authority to issue these notes, and the question of ratification by the general body of shareholders, may be treated as one ground, for ratification is only the evidence of authority. All the cases which will probably be relied on by the other side, belong to that class, in which the decision (establishing the non-liability of the Companies) has proceeded on the ground that the drawing of bills of exchange was not necessary for the purposes of the particular business, *Dickenson v. Valpy (e)* was the case of a Mining Company, as also *Brown v. Byers (f)* and *Hawkins v. Bourne (g)* *Bramah v. Roberts (h)* was that of a gas concern, and *Bult v. Morrel (i)* was that of a salt and alkali concern. In *Hawkins v. Bourne* a distinction lost sight of by the other side, is pointed out, viz. "that one partner is not bound by anything done by another without the scope of his authority and out of the usual course of business of the Company, but if the act done is within the scope of his authority, then he is liable with or without notice." The acts of the Bank and the shareholders (independent of the form of the notes) are cumulative, and afford overwhelming and irresistible proof of the adoption of these notes by the latter. Ever since the formation of

(a) 3 B. N. C. 589.

(b) 6 B. N. C. 415

(c) 5 B & Ald. 34.

(d) 1. Dow P. C. 40.

(e) 10 B. & C. 128.

(f) 16 Law J. 112 Ex.

(g) 8 M & W. 703.

(h) 3 B. N. C. 963.

(i) 10 A & E. 745.

the Bank, in 1829, these instruments have been issued for the purpose of general business. Half yearly meetings are held, and reports submitted, the account of outstandings exhibited, dividends declared and participated in by absent as well as present shareholders. The notes have always been issued in the same form, always certified by the secretary and signed by two directors; so that all along proprietors have had notice of their existence, acquiesced in their issue, and participated in the profits derived from that issue; even supposing therefore that the deed did not actually authorise the issuing of these notes, and that there had been an actual departure from, and infringement of the deed, still the shareholders, by their subsequent and continued recognition and acquiescence, cannot but be liable. The subsequent recognition amounts in fact to a drawing: for, having allowed their directors to act in breach of the conditions of the deed for a series of years, the proprietors are bound by the acts of those directors, their means of knowledge of those acts having been amply sufficient. *Ex parte Buckley* (a) overruling *Hall v. Smith* (b), *Swan v. Steel* (c), *Waugh v. Carver* (d), *Ex parte Watson* (e), *Lacy v. Woolcott* (f), *Blewet v. Gordon* (g), *Crellin v. Calvert* (h), *Steinberger v. Carr* (i), *Fitzherbert v. Mather* (k).

Mr. Colville, A. G., Mr. Dickens and Mr. Morton contra. There are three points to be argued here, although they have on the other side been resolved into two only, viz. 1st, The question as to form. 2nd, That as to authority: and 3rd, as to ratification.

(a) 14 Law. J. 341 Ex.

(b) 1 B & C. 407.

(c) 7 East. 210.

(d) 2 H. Bl. 235.

(e) 19 Ves. 459.

(f) 2 D & Ry. 458. 1 Law. J. 143. K. B. (s c)

(g) 1 Dowl. (n. s.) 818

(h) 14 M. & W. 11.

(i) 3 M. & Gr. 191.

(k) 1 T. R. 12

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1st. As to the form—notes of this description have been issued and circulated ever since the institution of the Bank, in 1829, but not in this form. In those originally issued the words “Union Bank” alone existed: for some reason unexplained the additional words “post note” have been recently added. There was good reason for their adoption: this form was used as early as 1840, at which time the act had not passed. The fact is, and the presumption to that effect is also strong, that the addition was introduced for the purpose of affording an easier remedy to creditors, indicating, that the Union Bank pledged their own credit; and also with a view to remove the fears of creditors, who dreaded the effect of pleas in abatement, by the pleading of which they might be compelled to make all shareholders parties. If the notes had been in such a form, as to make the promise alleged on the face of them the promise of all the shareholders, then it would have been extremely inconvenient to sue on them, but as the promise is expressed to be that of the Directors only, pleas in abatement could not be used. By the law merchant no person not an actual party to a bill or note can be bound thereby. It may be conceded that the intention of the parties who drew these instruments, was that the Bank should be the party to whom credit was given, the question is, was that intention effectuated? In *Ledbitter v. Farrow* (a) it was decided, that where the terms of an instrument were not explicit, although it might appear that the party signing was an agent, still that he would be deemed to have contracted in his personal capacity. If Farrow, in that case, had signed per procuration, or in fact in any way other than as Farrow, he probably might not have been held liable. *Burrell v. Jones* (b) is an authority to show, that where the agent is a direct party to the instrument, and the

(a) 5 M. & S. 349.

(b) 3 B. & Al. 47.

principal is not, the agent, though describing himself as agent, is sueable as on his own personal contract. The observations of the Judges in that case as well as in *Hall v. Ashurst* (a) are most applicable to the present case, for they decide that however agency may appear on the face of the bill, if the forms required by the law merchant are not used, then no action can be brought against the principals. The mere addition of a title or designation, cannot destroy that liability; nor does the question of credit arise. In *Crew v. Petit* (b) Mr. J. Littledale is reported to say, "The parties to the note describe themselves as churchwardens and overseers, and by this they seem to me to recognize the vestry as managers of the business—as their agents for this purpose. It is said there ought to have been notice, but it does not appear that the defendants were sureties. On the contrary they appear on the notes as principals; and if they sign as principals, they cannot be entitled to notice." In *Story on Agency* (c) the drawers signed a note describing themselves as "Trustees of the Union Religious Society," it was held nevertheless that they were personally liable, although it was proved that the society was a corporation, and the note given for a balance due from the society itself for purchase of a Church bell. (Mr. *Prinsep*. The American cases are too conflicting to be relied on as authorities.) [*The Chief Justice*.—I am aware they go a great length, but I am not disposed to agree entirely with them. If the doctrine of principal and agent is to be applied to bills of exchange and promissory notes, very momentous questions would arise.] In *Kirk v. Blurton* (d) the point decided was that the law implied no authority in individual partners to bind his co-partners by his acceptance of

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(a) 1 C. & M. 714; 3 Tyr. 420; (c) p. 240.

2 Law. J. (n. s.) 295 Ex. (d) 9 M. & W. 283; 12 Law

(b) 1 A. & E. 196; 3 N. & M. 456. J. 117 Ex. (s. c.)

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a bill of exchange, except by an acceptance in the true style of the partnership as held out to the world. Suppose a note in the following form; "Union Bank bill of exchange. Sixty days after sight pay to A. or order £10,000, being the amount paid by him into the Union Bank as a fixed deposit for six months with interest at 6 per cent. and place the same to the account of the Union Bank." Suppose this instrument signed W. P. Grant, J. Rennie, *Directors*; addressed to Ramanath Tagore, *Cashier*, and then accepted by the latter in that form; is there any doubt but that that individual would have been liable, and not the Union Bank. Such an instrument would have been a bill of exchange, on which all the world would have given credit to the Bank alone, and yet the latter would have been liable.

Then as to the question of authority. If the signers of these instruments were authorised to sign them, then the question of authority of course would not arise. It is submitted however that they were not authorised. All parties by reference to the terms of the Bank Act (it being a public one) had notice of the precise extent of authority entrusted to the directors. The recitals in that Act are partially recitals of the partnership deed. The second clause is expressly prohibitory and forbids the issue of such instruments as these. Although that clause is not recited in the Act, yet as the Act refers to the deed, which specifically sets out the powers of the directors, takers of these notes were put upon enquiring the extent of those powers, both affirmative and negative; that of itself is sufficient to support the argument: for no question of implied authority arises here at all. Cases have been referred to, which decide that the directors of a mining company have no implied authority to draw bills and notes: if so, still less have the directors of a banking company that authority, especially when their powers are expressly defined. It has been taken

for granted, however, that the issuing of promissory notes and bills of exchange is part of the ordinary business of bankers. That is altogether denied. If such were the case, consequences of a most disastrous nature might ensue. If a Bank has power (as incidental to its business) of issuing notes at sixty days sight, so would it also have power to issue them for an unlimited date, and keep them outstanding to an unlimited extent of time; a power manifestly unreasonable and productive of mischievous results. No document whatever is issued by the Bank of Bengal bearing any similarity to these long dated post bills. The amount of them, according to the evidence, was originally restricted, but during the two last years their issue had become enormous. It has been urged that the shareholders had notice of their existence from the accounts and reports. That is not so; a reference to them will show at once that no outstandings were apparent on the face of the reports, to which alone the shareholders look, and from which they gain their information. The utmost presumption against the shareholders (particularly the absent) is that they supposed that the post bills mentioned in the accounts were bills of exchange drawn after deposit received by the bank, in conformity with the provisions in the deed; not that they were unauthorised promissory notes like these, issued in direct violation of the deed. All the notice the shareholders (absent or present) collected, or could collect by reference to the accounts and reports, was the bare fact, that the directors were in the habit of drawing instruments, apparently in conformity with the power given them by the deed, of the existence of which power there could be no doubt. If it is to be contended that the shareholders acquiesced—that argument is involved in the first point. All that the shareholders did was as guarantors. Persons out of the jurisdiction of this presidency had no means of knowledge. The shareholders were a fluctuating body;

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some had been out of this country for years, and the average number of such as were absent were two-thirds of the whole number. Notice to the Bank is not notice to the shareholders, and notice to the latter is not notice to such of them as have been or are absent. The cases therefore cited on this point have no application. Looking at the terms of the deed, it cannot be inferred from the accounts that the latter contained such notice as to put even a prudent and cautious shareholder upon his guard.

Then as to ratification.—The question seems to resolve itself into this—does recognition by a considerable number for a considerable period bind the whole body, or must recognition by all be proved in order to bind all. If the former, the plaintiff's case is proved; if the latter, then the evidence is deficient. No doubt many shareholders have recognized, but it is equally clear that many others were all along wholly ignorant of the proceedings, and against these no ratification has been or can be proved. *Powles v. Page (a)* shows that there can be no constructive notice, and therefore no constructive ratification. Ratification must be proved to have been by all concerned; there can be no ratification or recognition through others. *Brown v. Byers (b)* is also an authority to show that each case must be governed by its own circumstances, and the question is one for a jury to decide. How then is ratification applicable to a case like this? A subsequent ratification is, no doubt, equal to antecedent authority, but the rules of notice in a case like the present are not analogous to those incident to an ordinary partnership.—*Dickenson v. Valpy (c)*, *Bult v. Morrel (d)* and *Hawtayne v. Bourne (e)* show the distinction which the

(a) 3 Man. Gr. & Sc. 16.

(d) 12 A & E. 745.

(b) 16 Law J. 112.

(e) 7 M. & W. 595.

(c) 10 B. & C. 128; 5 M. & Ry.

126; 8 Law J. 51 K. B. (s. c.)

modern authorities have gradually established between joint-stock companies and private partnerships on this point; the reason being, that in consequence of the large number of shareholders, coupled with other circumstances, a joint-stock company scarcely partakes of the nature of an ordinary partnership, but amounts to a species of investment. [*The Chief Justice*.—If parties so act as to induce the world to give them credit, is not the rule as equally applicable to a joint-stock company as to a trading partnership?] It may perhaps be applicable in some degree to those who were present at the meeting and so become cognizant of the proceedings held there; here, however, two-thirds of the shareholders were absent and at a distance. The case of *Crelin v. Calvert (a)* clearly shows that the fact of actual notice must be governed by circumstances. It is not argued that the reports were intended to mislead; but the fact is that they did so; and if notice were intended to be conveyed in these reports, the intention failed. No *active* ratification, then, can be charged against the shareholders; as to *passive*, that must be founded on knowledge as distinguished from legal notice. In the case of a joint-stock company there can be no ratification unless by the whole body. As to the authorities cited by the other side,—*Anderson v. Bank of England* and *Booth v. Bank of England* have no sort of application to this case. The first was a case of a signature per procuration, the second disclosed acts in fraud of the Bank of England; and the Court merely decided that nothing could be done in fraud of the statutes. (b) The decision in *Holt* (it is submitted) is not law at the present day. [*The Chief Justice*.—The law certainly at that period as to bills of exchange was not very clear and decided, and all he seems to have held was as to whether the signature amounted to a suretyship. Besides in that case there was

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(a) 14 M. & W. 12; 14 Law
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a distinct promise by the maker. The authorities are full of difficulty, and suggest doubts whether such instruments create a primary liability or only a contract founded on suretyship.] This is a case where the "general law of agency does not apply, the law merchant alone is applicable. If the promise is so framed, that the party signing for another does not protect himself in express words from liability, he must be bound. The question is whose is this promise in law? It is submitted that it is that of the party signing.

The Court took time to consider, and this day [July 10th] judgment was delivered by

SIR L. PEEL, C. J.—In construing mercantile instruments, it is particularly the duty of a court of justice to regard the intention rather than the form, and to give effect to the whole instrument. The intention must be collected from the instrument, but resort may be had to mercantile usage in certain cases as a key to its exposition. If the whole of one of these Bank post bills be considered, it will in effect run thus: "this is an Union Bank post bill whereby we A. B. and C. D. directors of the Union Bank promise to pay on account of the proprietors of the Union Bank &c." To construe this as the promissory note, not of the Union Bank, but of the actual makers, we must consider the description of it, "Union Bank post bill" as though it were struck out, the addition of the words "directors" as mere description, unnecessary, and even tending to mistake and deception, and the countersignature of the secretary as an unmeaning form. But we think, that the addition of the words "directors" to their signatures, and by the countersignature of another officer of the Union Bank, the actual subscribers to the note testify that they adopt the descriptive part of the note, and render it true and operative instead of nullifying it. It is conceded that if the

words "on account of the proprietors of the Union Bank," had come in between the words "promise" and "to pay" or had preceded the word promise, they would have had the meaning of "for" or "on behalf of" and would not have borne to be considered as imputing an engagement primary, though undertaken on account of others. The controlling form of the words "on account &c." must rest in this case on their mere collocation. But, although in some cases the collocation or arrangement of words may be important and furnish an auxiliary argument of greater or less force according to the circumstances of such cases, we find in this case no such controlling power as to justify us in viewing these words as neutralizing the effect of the other evidence of intention, which the note presents. In *Hall v. Ashurst* stress was laid by Lord Lyndhurst on a similar arrangement of words: but he also dwelt, as did the other Judges, on the strong probability which that case afforded, being an engagement from one attorney to another in relation to the expences of certain proceedings before a Bankruptcy Court, that credit was meant to be given to the party signing; it was not clear that the creditors would be bound, or that any other person than the signer would be bound. The case, if it is not presumption for us to say so, appears to us to be not only correctly decided, but to be clearly distinguishable from the present. The instrument was not similar, and had the evidence of probability been the reverse of what it was, and of as strong a character, we have no doubt that the decision would have been otherwise, despite the arrangement of the words. A guarantee may be expressed in any words; so as it show a sufficient consideration. In modern times, the order of covenants on agreements as they are found arranged, is little regarded: the whole deed or writing is weighed, so that the whole may be made to harmonize. A partner, who may have authority so to bind his partnership

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firm, rarely considers very nicely in writing and signing a guarantee on account of the firm, the form and order of the words which he writes. The words "I guarantee" and "I undertake" to pay are equivalent expressions, and it would be just the same whether he wrote I guarantee, or I undertake to pay on account of Messrs. So and so, the firm, or I on account of Messrs. So and so, guarantee or undertake to pay, &c. That would be too narrow a construction, which, the circumstances otherwise being the same, holds the first to be his personal guarantee, the latter, that of the firm. There is no propriety in divorcing the words "promise" from the subsequent words; a promissory note is not satisfied by a promise to do any thing but *pay*, or to pay in any thing but specie; an express promise to pay in bills would not be a promissory note. The expression is therefore necessarily a compound expression, and the words "on account &c." are referable to the whole, and cannot be limited to the payment exclusively. In *Galway v. Matthews* the words of the note were "I pay," the word promise being understood as included. The cases of *Thomas v. Bishop* and *Ledbetter v. Farrow*, relied on, on the argument, are distinguishable. Those were cases on bills of exchange: they were addressed to drawers: the words "which place to the account of the Durham Bank," in the latter, and similar words in the former, were construed to be a direction merely to the drawers. But the foundation for that construction fails as to promissory notes; they having of course, no drawers, and presenting no body to be addressed or directed. It must not be supposed that because we do not admit in this case, the weight of the argument built on the sequence of these words, and on the form of the expression that we should hold them of no weight in all notes. In some, they might clearly indicate that the maker was a surety, that he pledged his credit on account of ano-

ther; in some the words might be merely surplusage, in such cases there would be nothing to exonerate the maker from the obligation attaching to his signature. But in this case, instead of the actual subscribers guaranteeing the payment by the Bank, and the note being taken on the faith of that guarantee, it would be the credit of the Bank which would be pledged. As surplusage we cannot view the words, and as they are not a direction, they seem to us to be most susceptible of the meaning, that the note is made for the Bank by its agents, which the other portions of it import. Two American decisions were cited at the Bar: in one the parties signing jointly and severally undertake for others, and we think it might be very reasonably inferred from that mode of undertaking, that their individual credit was meant to be pledged. In the other case the form of the note does not appear, but it appears that the signature was on behalf, not of any trading body, but of a society for the diffusion of religious tracts, and *primâ facie* there would be no authority to bind such a body by signing bills or notes for it. In a few of the American cases, the liability of a drawer of a bill or of the maker of a promissory note, has been apparently determined rather with reference to the general law of principal and agent than to the law merchant, as far as we can gather from the short statement of such cases in the late Mr. Justice Story's work; and this case may be of that class: but without speculating further on the grounds on which it may have proceeded, it suffices to say, that as the form of the note is not given, we are unable to say whether our present decision is at variance with it or not. With respect to the American decisions, they are not *authority* with us, though often extremely valuable as guides to the formation of a correct judgment. In order to ensure uniformity of decision in the same country, the decision of the higher tribunals

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are or should be authorities to inferior tribunals ; in such cases, the Judge, though his understanding be not convinced, bows to the authority : but he is not justified in deciding contrary to his own conclusions, in deference to a foreign tribunal, however superior in general he may acknowledge such jurists to be to himself. It was urged at the trial by the Advocate General that the expression in this note "The proprietors of the Union Bank" was not the true partnership name, which is "The Union Bank," and *Kirk v. Blurton* was relied on. This Bank has not kept strictly to its right name ; its promissory notes, payable on demand, are signed by the secretary, for the trustees of the Union Bank. It was argued that the Bank would not be liable even on these, but only the trustees, but there is, in our opinion, no ground for such an argument. The secretary would not be liable, for he does not undertake at all, but signs as mere scribe : the trustees would not, for it is not probable that mere trustees would have given the secretary authority to pledge their credit, but the common issue from the Bank and payment at the Bank, of this species of circulation, would furnish abundant proof of the adoption by the Bank of that mode of signature and description as binding on the Bank. In *Kirk v. Blurton* it was not proved, that the signature of Blurton and Co. had ever been acted on by the firm, but in *Faith v. Richmond*, referred to and recognized as an authority in that case, the doctrine of the law on the effect of user of a name differing from the true partnership name is fully recognized, and it would be strange indeed if the law enabled a partnership to avoid its securities on the ground of irregular or erroneous descriptions of itself, though it had recognized them. A name is applicable to an individual ; to a plea of misnomer, it might be replied that he was known as well by one name as the other. Mr. Kyd in his treatise on corporations, contends, and with

reason, that the same replication would be allowed even against corporations, though the strict adherence to the true corporate name, in cases of corporations by charter or Act of Parliament, was formerly much insisted on. Lord Coke inveighs, with great force and justice, against some decisions in which corporations had been allowed to avoid their own grants by alleging a misnomer. He shews that these decisions were contrary to earlier and more correct decisions, and there is reason to think that at the present day no such repugnance to legal principle or to justice would be allowed. In that case it was held that a description of a corporation by a grantee was evidence against one claiming under him, that the name of the corporation at the time of the grant was as described. But even in times when such strictness prevailed "some seeming difference" as Lord Coke has it, was considered not fatal, and mere redundancy to the name was of no moment. (*Dean of Windsor's case* Abr. Viner's Tit. Corporations p. 272.) The words proprietors of the Union Bank are exactly equivalent in meaning to the words the Union Bank, and words understood are added to the shorter expression, "the Union Bank." We are therefore of opinion on the first point that the notes are in form the notes of the Union Bank.

The more important question remains. The question of authority for their issue is included in the plea denying their liability, and notice is involved in this. As against bona fide holders for value without notice the Bank might be liable on an unanswerable presumption of authority: that is, liable on the implication of an authority derived on grounds of public policy. The ordinary rule of partnership is that the relation of partners confers a presumable authority (sometimes different from the actual) to transact all business relating to, and incident to that partnership, and within the *ordinary scope of a partner's*

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authority in similar societies. A bonâ fide dealer with the firm has to consider only how far the actual dealing accords with such apparent authority, he is not effected by excesses of authority arising out of violations of special partnership agreements, to which he is not privy; he is safe in acting on the general rule, on the general presumption of authority. This rule binds all trading societies, aggregate of many as well as those composed but of few, and whether corporate or not. The case of *Hawkins v. Bourne*, is a valuable authority to show the application of the rule to a joint-stock company, a *completed partnership*. It is denied, however, that the issue of Bank post bills forms part of the ordinary bussiness of a joint-stock-Bank. Such Banks may of course vary greatly, some may be Banks of issue, others not. It might be found impracticable to lay down a general rule strictly applicable to such varying dealings. But the question here is simply whether a bonâ fide holder for value, might in taking such notes as these, reasonably consider that it fell within the ordinary dealing of the Union Bank to issue them. If the case were received, even as it would have stood before any long usage of issuing such instruments had existed: (and this is the point of view most favourable to the case of the defendants,) still, in our opinion, the Bank would be liable to a bonâ fide holder for value without notice of the restriction in their deed. It is not denied, that as the power to issue bills of exchange existed, (though it is wisely and carefully guarded by the partnership deed,) that, had bills of exchange been issued, in defiance of those restrictions by the directors, as accommodation bills for instance, and not on the security specified in the deed, that the Bank would have been liable to pay such bills of exchange in the hands of bonâ fide holders for value without notice. Now a Bank post bill may be either a bill of

exchange, or a promissory note, according to the form in which it is made, and with a very slight variation in form, all these Bank post bills might have been issued as bills of exchange without varying the liability of the Bank upon them, and without the addition of parties strangers to the Bank. Such Bank post bills, being bills of exchange, could not have been impeached then, in the hands of a bonâ fide holder for value. If they had been in fact issued on such security as the partnership deed stipulates, the issue of them would have been a legitimate exercise of one branch of business provided for by the deed. The danger consists, not in the form of the instrument, but in the improvidence of their issue. But strangers to the deed could not know on what security they were to issue; and all such instruments import a consideration. It cannot then be said, since many Bank post bills might have been issued with strict regularity, that the issue of Bank post bills in any form was primâ facie, and presumably an unauthorized issue and should have put third persons on enquiry, as raising any inference of a business beyond the scope of the ordinary authority. But promissory notes are, by the statute of Anne, put on the same footing as bills of exchange (*Brown v. Harraden*, 4 Term Reports; and the argument of Mr. Holroyd as to promissory notes indorsed before the statute.) No ground therefore would exist, primâ facie, to suspect that an issue of promissory notes was prohibited, and of bills of exchange permitted. The same instrument may be so drawn as to be declared on as either. It was in evidence that this Bank issued bills of exchange and to a considerable extent, though the latter were payable on demand. But the case has been carried much further by the evidence of the user. Since so much stress has been laid in the argument on this being a body quasi corporate, and modifications of the law have been much insisted on, as established

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in favour of such bodies for the protection of the parties composing them, it is well to consider what protection was extended to the prejudice of strangers in favour of the members of bodies strictly corporate: for it cannot be established that the law has been modified in favour of bodies quasi corporate, so as to confer a greater exemption from liability, than that of a body strictly corporate of a similar character. Upon the same principles that the case has been argued, if they be sound, the user could not have established a liability against the provisions of the deed, though it had been of half a century's duration. But even the most solemn Charters of the Crown, much higher instruments than were deeds of partnership, have been greatly modified by usage. Many municipal corporations had dependant bodies, as guilds or fraternities, some occasionally incorporated. Many of these were founded for trading purposes, and many municipal incorporation charters, though government was their primary object, conferred valuable commercial privileges; exclusive trading privileges; exemptions of various kinds, and the like. From long disuse of exclusive privileges, a renunciation of them would be presumed. Though the mayor of a corporation has not a casting vote by law, and though the charter gave him none he may acquire it by usage. Though the acquittance, or other deed of the mayor alone bind not the corporation, yet it may so by usage, (*Jenkyns 4 centenary*, p. 162.) The modifications of the right of election are familiar to every one. The most solemn partnership deeds of individuals are modified by usage, the quasi corporate bodies cannot, as to their partnership deeds, be more exempt from the power of usage in modifying the strict provisions of their private deeds, than were corporate bodies from the words of their charters. In favour of strangers the modifications would be presumed regular. The acts of de facto mayors, bound the corporation in

favour of strangers, because the body had the power to renew, and neglected it. As between themselves, there was a difference between the binding force of acts done by de facto and de jure mayors. The corporations were liable for the acts of their ordinary servants done within the ordinary scope of their employments, though done erroneously and without actual authority, or in violation of it. It was sufficient in such a case to show that they were such servants, and their acts. It was not inquired whether the majority, still less whether every individual had been too supine, too confiding, had given directions, or had actually interfered, (see *Moodaley and the East India Company*, (1. Brown, C. C.) *Mayor of Lincoln v. Mayor of Derby* (1 Kyd 191.)—see also 1 Kyd 314. *Sutton v. the Bank of England*, 1 C. & P. *Davis v. the Bank of England*, 2. Bing. 393. *The Lancaster Canal Company v. Parnaby* (11 Adol: and Ell. 223) (a) The two last cases illustrate the position, that he, who by his act induces a well founded belief of an authority, or state of things non existant, and thereby induces another to alter his position for the worse, is liable. The last case proceeded on the ground that a Canal Company, by forming a canal, invites the public to navigate it, with a view to the profit of the company, and holds out that such navigation is secure: therefore, if the company by its servants or agents, is aware of secret dangers to the navigation it is liable for the non publication to the public of the danger. The East India Company, the Bank of England, Canal Companies, are all companies having numerous proprietary bodies. It was never asserted that they were in any way exempt from the general law of agency, from the general obligation so to conduct their affairs that others should not be misled; it was never supposed that these, as well as

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(a) In error 5 B. & C. 185. (s. c.)

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other bodies strictly corporate, were not liable for the acts, though unauthorized, by their official and ordinary servants, acting within the scope of such apparent and presumable authority. The cases to the contrary are too numerous to be cited, the law too clear to need the citation of any. The party reposing the confidence must suffer, if confidence be abused, in the case of a general agent acting with apparent authority. If a society whether aggregate of many or of few, whether corporate or not, so conduct its affairs as to give rise to a well-grounded belief in those dealing with it that an apparent is a real authority, it must abide the consequences. Powers of objection, reason, and control exist: the non enforcement of them must not be turned to the prejudice of strangers. We decide nothing as to the rights of the proprietors inter se, or the liabilities to them of their own managers. We decide against the Bank upon the broad ground that this aggregate body, which can only be sued as an aggregate body (for we are clearly of opinion that the mode of proceeding directed by the Act is obligatory in suits against the company, and that the property of the actual shareholders must first be exhausted before former shareholders can be reached,) is liable collectively and in the aggregate for the issue of notes by its officers, inducing a well grounded belief that there was authority to issue them: the uninterrupted issue for years to a large amount was naturally calculated to remove all doubts, to silence all question in later years. And we have no doubt whatever of the right of bonâ fide holders for value to enforce their claims on these securities against the Bank. But it is contended that the preamble of the Indian Act was notice to all the world. The preamble enacts no law: but merely states part of the provisions of the deed of the Bank. The Act leaves wholly untouched the power of the Bank to alter those provisions in the mode prescrib-

ed by the deed. The Act, though made public is in the nature of a private Act. *Brett v. Bales* (a) is a decisive authority that such preambles are not even evidence against strangers of the truth of the facts recited; on what ground are such recitals constructive notice? Ignorantia legis non excusat. This is reasonable and required for public convenience. Sometimes the maxim is stated that the people are bound to know the law. In fact, however, the bulk of mankind know little of the laws under which they live; and it would be extremely unreasonable to presume that they read or know any thing of preambles of Acts private in their nature, stating facts not made matter or parts of the public law. It would be stretching the doctrine of constructive notice in our opinion to a most unjustifiable extent. But even if the Act were notice, of what would it be notice? merely of the contents of the deed at the time of the passing of the Act. But as the deed contained a power to vary its provisions, and as there was no legal obligation on the company to communicate to the public its changes in its deed, persons might presume from the subsequent dealings, omnia inter se acta, and the change regular. Actual notice was not proved: there is no legal obligation on us to give effect to constructive notice. The plaintiffs must therefore be viewed as holders for value without notice. As to the claim of such persons on bills not disclosing on the face of them that they are invalid in law;—see the judgment of Mr. Justice Holroyd in *Broughton v. The Manchester Water Works Company*, (3 B. and Ald. 10.) The Rule therefore must be discharged with costs.

Rule discharged.

(a) M. & M. 421.

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Thursday.

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THE QUEEN v. HUME.

In the matter of William Anderson.

Habeas corpus—warrant of commitment by magistrate for contempt—indefinite period of imprisonment—infirmity of—

A warrant of commitment contained a direction to the Sheriff to detain one W. A. (for contumacy and contemptuous conduct in the presence of the magistrate) until the 7th day of May next, at which time he was to be brought up again before the justices—*Held* that the warrant was informal, the imprisonment being for an indefinite period and in excess of the magistrate's authority.

quare—magistrate's power to commit for contempt.

A WRIT of habeas corpus had been obtained on a former day, directed to the keeper of the gaol of Calcutta, and commanding him to bring up the body of one William Anderson. In the affidavit in support of the motion it was stated that Anderson had preferred a complaint before Mr. Stratford, (one of the deputy superintendants of police) against a servant for theft, and Mr. Stratford at his instance entered the complaint, with a view to its being heard before Mr. Patton the chief magistrate: in Mr. Patton's absence however, Mr. Hume (one of the police magistrates) proceeded to hear and determine the case, which otherwise would have come before Mr. Patton; and whilst Anderson was in waiting, Mr. Hume sent a peon to require his attendance; Anderson (having some time previously presented a petition to the Government of Bengal against Mr. Hume, of which the latter was aware) did not wish the present case to be heard by that magistrate, he therefore, whilst seated in the ante-room, wrote the following note to Mr. Hume:—

“To J. Hume, Esq. Magistrate.

SIR,

With due respect for Her Majesty's Court and Laws, I have to request you will let the Chief Magistrate try my cause, as I think you mix up your private feelings with your judicial duties.

I am, Sir, yours obediently,

April 22, 1848.

W. ANDERSON.”

On receipt of the above Mr. Hume again sent for Anderson, and on his presenting himself, Mr. Hume produced the note, stating that he possessed the power of fining and imprisonment, and that if he (Anderson)

would withdraw the note and apologize, he would not punish him. Anderson however declined to do so, and on his refusal Mr. Hume issued the following warrant of commitment :

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“ To the Sheriff of the Town of Calcutta.

Receive into your custody the body of William Anderson, for that he the said William Anderson, on the 22nd of April 1848, at the Police Office in Calcutta, did contemptuously neglect and refuse to prosecute one Muddooby, whom the said W. Anderson charged with felony before me ; asserting as his reason for so refusing that I, as one of Her Majesty's Justices of the Peace for the Town of Calcutta, allowed my private feelings to influence my judicial duties, and that thereby he the said W. Anderson was unable to obtain justice, and him detain until the 7th day of May next, at which time you will bring up the said W. Anderson before Her Majesty's Justices of Peace.

JAMES HUME,

Justice of Peace.”

Under this warrant Anderson was taken into custody.

It was contended on moving for the writ, that the warrant of commitment was informal in awarding a punishment during a definite period, for mere contumacy, the offence being “ contemptuously neglecting and refusing to prosecute:” and the following passage in 1 Burns, 780, was cited : “ if the commitment be not for an offence so indictable, or being rather of a civil than criminal nature, as for contumacy in refusing to do something, which he ought to do, the commitment ought to be *until* he comply, and perform the thing required.”

The gaoler's return to the writ was, simply, that he held Anderson under the above warrant : to the form of the warrant however, no objection was taken.

Anderson being now brought up, Mr. *Clarke* moved for his discharge.

Mr. *Colville*, A. G. appeared on behalf of Mr. Hume, and contended that the committal was not for contumacy

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merely, but for a contempt: the case therefore did not fall within the authority in *l Burns*, and on which the rule was granted. In the case of *Rex v. James (a)* it was laid down, that a commitment for a contempt being a commitment for punishment, must be for a *time certain*: the warrant of commitment therefore, in its present form was perfectly correct; indeed, it could not, according to that decision, be otherwise.

SIR L. PEEL, C. J.—I perceive the warrant specifies that the commitment was not solely for contumacy, but for contemptuous manner also: according to the case cited therefore, the form to that extent would be correct. But this warrant directs not merely a detention for 15 days, but orders that at the end of that period Anderson “be brought up again before Mr. Hume.” This being a committal for an indefinite period, is clearly in excess of the authority of the Magistrate. We do not express any opinion as to whether or not a Magistrate has power to commit for a contempt: there is no doubt however, that a magistrate being a judge of a court of oyer and terminer, having power to try and determine felonies, has equal power with the justices sitting in sessions. Whether the latter have power to commit for contempt, was discussed, but not decided in *Rex v. James*. Act XXI. of 1839 s. 8, provides that if a witness summoned by a justice shall refuse to attend as a witness, or to give evidence, he shall be liable to be punished by Her Majesty’s Supreme Court; and it may be questioned, whether this does not by implication negative any power in a justice of himself to punish contumacy. The letter sent to Mr. Hume is undoubtedly highly improper and offensive, and, even if not cognizable by the magistrate, the state might punish by indictment. The imputation was as unjust as

(a) 5 B. & Ald. 894.

uncalled for: at all events such charges and imputations ought not to be conveyed in this manner: in all cases of judicial misbehaviour, there is a proper course through which it can be corrected. Our decision is founded solely on the informality apparent on the face of the warrant of commitment. Had this been a regular conviction, with a punishment for a time certain, we should not have attended to an affidavit against the facts stated in the conviction.

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Prisoner discharged.

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Monday.

THE QUEEN v. THE DIRECTORS OF THE UNION BANK.

MOTION for a rule to show cause why a writ of mandamus should not issue directed to the Directors of the Union Bank, commanding them to enrol in the proper office of the Supreme Court, a memorial of the transfer to one Kallikissen Ghose of seven bank shares, previously the property of Aushotosh Deb. The affidavit in support of the motion stated that the shares in question had been sold by the latter to the former in November 1847, for Rs. 300 a share; that the transaction was entered into bonâ fide and without collusion between the parties; and that the purchase money was paid down at the time, notice of the purchase and sale was given to the Bank, and the shares were transferred in the Bank-book and the usual forms observed. Subsequently Aushotosh Deb was called on to pay a contribution of Rs. 200 a share, which he declined to do on the ground of his not being any longer proprietor of the shares. Kallikissen was then applied to as the proprietor of them, and he accordingly paid to

*Joint Stock Co.
mandamus—Transfer of shares—enrolment of—Act xxiii of 1845.*

The Court will not compel a private trading association to enrol transfers of shares, after it has stopped payment.

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the secretary, on account of the Bank, Rs. 2,400 as his contribution, and received a written receipt for the amount. A notice was also served on the secretary of the Bank, desiring him to cause a memorial of the transfer to be registered in the Supreme Court, according to the provisions of Act XXIII. of 1845, to which no reply had been received. At the time of the transfer the Bank was insolvent, or on the eve of insolvency.

A rule nisi was granted, notices to be served on the directors and secretary of the Union Bank, and on the president of the committee of creditors of the Bank.

Mr. *Colvile*, A. G. (with whom were Mr. *Dickens* and Mr. *Morton*) now showed cause upon the affidavits of Mr. Abbott the secretary at the time of transfer, and of Mr. Russell, the secretary since January 1848. The former stated, that Kallikissen the purchaser having tendered Rs. 200 per share, he (Russell) did not consider himself justified in refusing to receive that sum, or entering into the question whether Kallikissen had procured the shares *bonâ fide*, or held them on his own account, or merely as trustee for Aushotosh Deb, and that the receipt for the payment of the contribution was given in Kallikissen's name, as the apparent holder of the shares: but it was not thereby intended to admit that Aushotosh was in any wise exonerated from liability. Mr. Abbott in his affidavit stated that all transfers were made upon application at the Bank, as a matter of course, and without any enquiry: that although the deed of co-partnership required the assent of the directors upon each transfer, yet in the ordinary routine of business, such consent was not usually expressly required or obtained, but the transfer was generally passed and verified by the secretary or deputy secretary alone: upon this occasion no application was made to any director to the best of his (Abbott's)

knowledge and recollection, but that the same was registered and verified in the usual manner: the memorials were filed annually, and that, if required to be filed on each transfer, it would have been necessary to file one almost daily, and great expence would have been thereby needlessly incurred.

On behalf of the Bank it was contended, that the affidavit in support of the motion did not show that the assent of the directors to the transfer had been obtained, as required by the 26th clause of the partnership deed, which provided, "that no assignment or transfer of any shares in the capital stock of the company should be valid or effectual as against the company until the assignment or transfer should be registered with the consent of the directors for the time being, and certified on the back of the certificate by the secretary, and until the person to whom the shares should be intended to be transferred should have executed the deed." The 5th clause of the act provided, that "a memorial of transfer should be made within 12 calendar months after transfer," it might therefore be a question whether the Court had power to compel a transfer at any time *within* that period. The 6th section also, and the forms of the memorial as appended to the Act, showed that each memorial must comprise all the transfers since the date of the last memorial, and that they could not be limited to the single transfer of a single individual share.

Mr. *Clarke* and Mr. *Gordon* for Aushotosh Deb.

The first question is—whether the Court has power to grant the mandamus. The rule is that the Court will issue a mandamus to enforce a private right against a public officer. The directors and secretary of the Union Bank are, under Act XXIII. of 1845, public officers for certain purposes, for the bank can sue and

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be sued in the secretary's name, without his being rendered personally responsible. A copy of the memorial recorded in the Supreme Court on the affirmation of a director or the secretary, becomes evidence for the public of the liability of the shareholders in actions against the Bank. The memorial being a public document, he, whose duty it was to register or enrol it, becomes for that purpose a public officer, by virtue of that Act which conferred the authority, and enjoined the duty ; and Aushotosh Deb as a late shareholder, has a right, on his ceasing to be so, to have evidence of the fact duly enrolled in the memorial. In the case of *Rex* against *The Bank of England* (a) the Court refused to compel the Bank to disclose their accounts in order to compel a dividend, Abbott C. J. observing that "it was on examination a question for the Court of Chancery." Holroyd J. characterised the application, as an attempt to expose "private accounts," and Best J. stated "that it would be making the Court auditors for all trading companies." But none of these objections can apply in the present case, for the object of the motion is not to expose accounts or compel payments, but is to make that public, which it was intended by the Act should be made public, and to supply evidence to the world at large with a view to enable them to sue, in return for the boon conferred on the Bank, which enables the latter to sue in the name of its secretary. *Rex* v. the *Mayor and Aldermen of London* (b) *Anon* (c) *Middleton's case* (d) *Reg. v. Victoria Park*. (e)

2ndly. The next point turns upon the wording of the Act, which requires enrolment *within* 12 months. The reasonable construction of this clause is, that although it be imperative on the Bank to enrol *within* the period

(a) 2 B. and Ald. 620.

(e) 1 Q. B. 188.

(b) 2 T. Rep 177.

Note. See *Rex*. v. *The London*

(c) 2 Str : 696.

Assurance Co. 5 B. and Ald. 899.

(d) 1 Sid. 169. Lev. 123 (s. c.)

limited, yet it never was intended that the directors should be at liberty, according to their own will and pleasure, to enrol or to refuse to enrol intermediate sales and transfers of shares, when called on to do so by vendors and purchasers. Such a proceeding is calculated to injure the Bank, the shareholders, and the public, for it amounts to withholding and suppressing evidence of the fact of the liability or non-liability of shareholders. The construction is supported by the letter of the Act, and is certainly not opposed to its spirit, publicity and facility in obtaining evidence being its primary object. The affidavits sufficiently show that the requisites of the deed have been complied with, and that the transfer has been duly made according to the routine of business, and the usual formalities adopted and observed on all occasions of transfers in the Union Bank. [*The Chief Justice.* The difficulty we feel is this: it appears by Mr. Abbott's affidavit, that the usual routine was in reality in violation of the deed, and therefore it is not a case in which we should interfere by mandamus, unless by law compelled to do so. The affidavits must shew that every thing has been complied with: the express assent of the directors to the transfer ought to be shown.] It is submitted, that if the case were otherwise, it would be rather the duty of the other side to shew in what respects the ordinary routine of business has been departed from, and that by direct proof, and positive averment, not by an affidavit stating circumstances upon the recollection only of Mr. Abbott. The documentary evidence, the records and papers now in the possession of the Bank, would have shown completely whether the Bank had given their assent or not. In the absence of such evidence the Court would not presume the contrary. That the regular course has been adopted here, is not denied, but is in fact admitted by Mr. Abbott's affidavit, stating that the transfer was registered in the usual manner: this is

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further confirmed by the fact of Kallikissen having been subsequently treated as a purchaser, and his being allowed to sign the deed, which of itself shows assent on the part of the directors, the deed being in the custody of the Bank. Then the amount of the call was accepted from him as purchaser, and the receipt granted in his name. The directors cannot in the face of the deed; (which is in their own custody) take advantage of an irregularity committed by themselves. There is ample evidence that every thing has been done regularly, nor does Mr. Abbott's mere assertion that the practice of the directors has been usually contrary to the provisions of the deed, prove that they so acted in the particular instance. The deed does not require any formal mode of transfer or assent; it may be verbal, or it may be given in writing. It must be presumed that the secretary had acted up to his duty in laying the application before the directors. The only objection which the Bank can urge is, that the transfer was collusive; but (independently of the fact of fraud and collusion being denied) they are now estopped from so contending, for they not only sanctioned the transfer, but entered it in their own books. The memorials of transfers being public records, ought to be kept in conformity with the books; and, as the Bank cannot question the title of Kallikissen, the party ceasing to be a shareholder has a right to insist upon having that fact memorialised.

SIR L. PEEL, C. J.—The case has been argued on the insufficiency of the affidavits in answer to the case for the mandamus: but the applicant should clearly show by his own affidavits, that all which was necessary by the partnership deed to make a complete transfer, has been done. This requires the consent of the directors. It is not expressly stated, that such consent was given; the language of the affidavits in this respect is particularly

vague; it refers to a routine of office,^o and makes use of the words "duly transferred," so as not to present directly to the notice of the Court, the parts which are considered, as amounting to a complete legal transfer. It is said that the Court should infer as against the Bank a complete legal transfer; but the rights of creditors have now intervened, and we ought to be sure that our interference may not prejudice their claims, before we exercised this power. It is to a certain extent a discretionary remedy: and (assuming that it lies against such a company as the present), to command the performance of an act of this character, we ought to be certain that the applicant has a perfect title, which of course it lies on him to state and prove. There is nothing in Mr. Abbott's affidavit to lead to an inference of a consent in fact having been given. It rather tends on the contrary to show, that no deviation took place from the previous irregular course, which was in violation of the deed of partnership, that the transfers were not subjected to the directors for their express assent. It was an important provision; and was then specially important; no routine of office is enough: it was the duty of all concerned to conform to the deed, and in the then condition of the Bank it would have been a breach of duty of the directors to assent to any transfer of shares, until the real state of affairs could be ascertained, this Court (even if a clear title had been shown) would have been altogether averse to interfere, after the Bank had stopped payment. It is not necessary to decide whether the remedy by mandamus lies; nor whether it lies within the 12 months: we are clear that if it did, it is not a proper course to be applied after the Bank has stopped payment. There are great difficulties in the way of the remedy by mandamus. The Advocate General has, we think, contended correctly, that this writ cannot issue as prayed for, viz. as limited to the particular shares in question; and an enrolment of the memorial containing

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1848. all transfers since the last memorial would be a result of
Crown Side. it. The late statute as to such writs is not here in force:
 QUEEN the statute of Anne applies only to corporate offices, and
 v. has a very limited application even as to them. An action
 UNION BANK. for a false return would seem to be the only way by which
 the truth of a return could be questioned: so that the
 remedy would in effect be little advanced, even if the writ
 were granted, because it is not to be supposed that the
 validity of the transfer would be conceded.

Mr. *Prinsep* (with whom were Mr. *Cochrane* and Mr. *Ritchie*) appeared on behalf of the creditors of the Bank, and applied for their costs.

SED PER CURIAM.—Permission to appear was granted as an indulgence to the creditors. The late statute as to mandamus does not apply to this country. We are not certain that the Court has power to grant your costs.

Rule discharged without costs.

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HASLEBY v. OWEN.

*Ca. sa. in detinue—
 effect of.*

A. ca. sa. in an action of detinue for charters, operates as an extinguishment of the right to them,

DEMURRER to the replication to 3rd plea.—The plaintiff was in detinue for title deeds. Pleas—1stly, not guilty. 2ndly, not possessed. 3rdly, That the plaintiffs in October 1846 impleaded in the Supreme Court one Thompson in an action of detinue for detaining the same identical deeds and writings in the plaint mentioned and such proceedings were thereupon had in that action that afterwards the now plaintiff by the judgment and consideration of the Court recovered against Thompson the said deeds

and writings or the sum of Co.'s Rs. 22,000 for the value of the same and also his damages costs and charges amounting to Co.'s Rs. 909-10 beyond the value aforesaid whereof the said Thompson was convicted as appears by the record &c. That after the recovery against Thompson the now plaintiffs in order to obtain execution of the said judgment sued and prosecuted out of the Supreme Court a writ of *capias ad satisfaciendum* upon the said judgment commanding the Sheriff of Calcutta to take the body of Thompson to satisfy the plaintiff the said sum of Co.'s Rs. 22,909-10 which the said Hasleby had recovered as aforesaid. That under such writ Thompson was taken and arrested by his body by the Sheriff and detained from thence hitherto. That plaintiff by reason of the premises elected to abandon their property in the said deeds and writings and to accept the said sum of Co.'s Rs. 22,909-10 as the value thereof in full satisfaction of the detention and all causes of action in respect thereof—that the damages by the said judgment awarded as the value of the deeds were estimated and assessed as and for the full value thereof and were satisfied by the said taking and seizure of Thompson in respect thereof. That the detention of the deeds by Thompson was a detention not later in point of time than the detention in the plaint in this action complained of and that before such time the said deeds being in the possession of Thompson and the defendant having no notice that the same were not the lawful property of Thompson he (Thompson) pledged and delivered the same to the defendant for Co.'s Rs. 8,000 then advanced by defendant to Thompson upon the security of the said deeds which said sum still remains due and owing to defendant and the defendant then took and detained and still detains the same under and by virtue of such pledge and delivery by Thompson—such detention being the same as that now complained of.—

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The replication to 3rd plea in substance was as follows : That after the taking and arresting of Thompson and while he was in custody and before the commencement of the action Thompson applied by petition to the Court for relief of insolvent debtors at Calcutta and executed an assignment of all his property to the common assignee and filed a schedule purporting to contain a full and true account of all his debts :—that since pleading the 3rd plea Thompson had been adjudged entitled to the benefit of the act and discharged from custody under the said writ accordingly ; that the common assignee received no estate or effects whatever by virtue of the assignment to him whereout the damages and costs in the plea mentioned could be satisfied and discharged, and that the judgment in respect thereof remained unsatisfied, and no part of the Rs. 22,000 had been paid in satisfaction of the detention of the deeds in respect of which the former action had been brought.

Demurrer assigning for causes—That the matters in the replication alleged contained no answer to the defence set up in the 3rd plea—that the right of action by plaintiff against the now defendant for the detention in the plaint and plea mentioned was wholly barred by the plaintiffs having elected to take the body of Thompson in execution for the damages awarded against him in the former action of detinue as and for the full value of the deeds in the manner and under the circumstances in the 3rd plea alleged—and that no subsequent discharge of Thompson under the insolvent act even if such discharge had taken place before the present action commenced could have the effect of revesting in the plaintiff the right of action so barred. That even if such discharge could have that effect if made before action brought it could not entitle the plaintiffs to maintain an action of detinue commenced before the date of such discharge especially if such discharge occurred after plea pleaded. That

although it was stated in the replication that the common assignee did not in fact receive any estate and effects by virtue of the assignment to him whereout the damages and costs mentioned in the plea could be satisfied, yet it did not appear that Thompson at the time of filing his petition or of his discharge had *no* estate. That in the absence of such allegation, it was not inconsistent to suppose that Thompson had then property, or that the assignee substituted for the common assignee might have been entitled to and received property of Thompson's to satisfy the judgment. That it appeared from the replication that the plaintiff was entitled to prove for the full amount of the damages and costs under the insolvency, and as it was not stated that he had in any manner given up or relinquished his claim thereunder, it was consistent to suppose that the plaintiff might receive the whole of the damages from the estate of Thompson. That the replication showed the detention by defendant to have been lawful at the time of filing plaint—if so the action could not be maintained, it being brought for wrongful detention. That the replication assumed the detention to have become wrongful since plea pleaded, it therefore amounted to a departure from the plaint.

Mr. *Clarke* and Mr. *Ritchie* in support of the demurrer :—The plaintiffs by suing out a *ca. sa.* against Thompson, have conclusively elected to abandon their property in the title deeds, at least at law, and to treat Thompson as their debtor for the value. Satisfaction of the damages by execution against the person, is equivalent to payment of those damages in its effect upon the property, (the thing sought to be recovered in the former action) and operates so as to give the transaction the effect of a sale by the plaintiff to Thompson. As against the present defendant especially, (who is in the position of *bonâ fide* purchaser from the former defen-

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dant of the title deeds, without notice,) the effect of the satisfaction of the judgment would be to vest the property in the former defendant retrospectively from the date of the original bailment, so as to enable him to make a good title at any intermediate period to the purchaser for value, *Cooper v. Shepherd* (a) *Adams v. Broughton*. (b) *Holmes v. Wilson* (c) and *Barnett v. Brandao*. (d)

Mr. *Montriau* contra.—The defence is, that the plaintiff has been satisfied, and the wrong compensated, or it may be treated as an explanatory and argumentative denial of property. Defendant admits and justifies the detainer. He says; ‘Thompson is in prison under a judgment obtained by this plaintiff for a wrongful detainer of these very deeds, not later in point of time than the detainer which is the subject of this action; and I have a lien against Thompson.’ It is submitted, these facts do not justify or make rightful the withholding plaintiff’s title deeds. *Primâ facie*, title to the land, the subject of the deeds, is conclusive (*Harrington v. Price* (e)); it has not been contended that either Owen or Thompson could compel a conveyance, in equity; nor is it explained how the judgment and *ca. sa.* operate as an estoppel to assertion of property in the deeds. There is no authority to shew that a *ca. sa.* or the taking means to obtain a satisfaction, is in itself, a satisfaction; taking the person is an incipient satisfaction in the suit in which the writ issues, so as to prevent any other mode of execution, but it does not satisfy *per se* even the judgment in that suit. The question of whether the bar raised here is a satisfaction, is tested by the fact that the judgment against Thompson has not been satisfied; for there has been nothing equivalent to pay-

(a) 15 Law. J. 237. C. P.

(c) 10 A. & E. 511.

(b) 2 Stra. 1708.

(d) 6. M. & Gr. 640.

(e) 3 B. & Ad. 170.

ment. Detinue affirms property, *Bishop v. Viscountess Montague* (a) and this plea, whilst it negatives that the subject of property has been restored, does not show any abandonment of property or solutio pretii, as in *Cooper v. Shepherd*. A ca. sa. is nowhere treated as complete and conclusive satisfaction, so as to bar concurrent remedies, much less as a solutio pretii to transfer property. The action of detinue does not, strictly, sound in damages: the judgment is for the thing, with damages for defendant's detention of it; the value of the thing is assessed, because execution goes for the sheriff to demand and recover (besides the damages) the specific thing detained, and *if that cannot be delivered*, then the value: neither the plaintiff nor the sheriff can elect, *Peters v. Hayward* (b).

The replication relates the sequel of the execution, in the history of the insolvency, and if the ca. sa. be a bar *primâ facie*, that bar is met and defeated by the facts replied. The discharge, being involuntary, does not release any concurrent remedy or joint liability, *Nadin v. Battie* (c). The assignee under the insolvency, it is contended, takes an interest in the estate not in the deeds: the deeds in Thompson's hands (and this defendant is his agent) are still our deeds. The general creditors are not before the Court: their claim is not paramount to the plaintiff's, they can have no claim to his title deeds, which still remain, unpaid for: and they can sustain no legal injury by the plaintiff's being permitted to pursue his remedies to the full extent.

SIR L. PEEL, C. J.—It is unnecessary for us to decide whether there has been a departure in pleading here. Our decision proceeds on the broader question raised. In detinue, the judgment is that plaintiff recover the chattel itself sued for or its value. If he

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(a) Cro. Eliz. 824.

(b) Cro. Jac. 681.

(c) 5 East. 146.

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does not obtain the chattel, he may resort to his remedy, for the purpose of obtaining its value, but that mode of execution, it is obvious, will not give him the specific thing. If, however, proceedings are taken against the *person*, then the judgment creditor only goes for that which is conditional on his realizing no damages; and then he must be considered as having made his election. No decision has been quoted in support of the proposition, that when a party has once made his election, he can be remitted. We think he cannot, where the rights of third persons have intervened, and are likely to be affected thereby, or where a party cannot be placed in his original position. Now, Thompson, having been arrested, and subsequently compelled to take the benefit of the insolvent act, cannot be replaced in his former position.

If the right of election cannot be considered as consummated at the time the debtor is sent to prison, it is difficult to say when the election can, with consistency, be said to take place. Many inconveniences would result from a contrary doctrine. If after arrest of the person, a judgment creditor could resort back to the chattels, no prudent person would, under the circumstances, advance on pledge or sale of the articles. Then difficulties would arise in the Insolvent Court, for a debtor must insert all claims by and against himself. Owen would be entitled to have his lien cleared, and that Court being one of law as well as equity, would look into all matters subsisting between the parties. There is nothing in the insolvent act entitling or enabling a creditor to resort back to his judgment. On principle, therefore, a judgment creditor, who has taken such an important step as to arrest the person of his debtor, cannot be permitted to resort back to his debtor's property, simply because it suits his views better to do so.

Demurrer allowed.

*Plea Side.*METHOLD *v.* MASSEY, and others.1848.
July 3.
Monday.

ASSUMPSIT on two policies of assurance (on the life of one Wodsworth) with counts for money had and received, and on an account stated. To the counts on the policies the defendants pleaded (amongst others) pleas alleging fraud in obtaining the policies, concealment of material facts, and personation of Wodsworth. To the common counts non assumpsit only was pleaded.

*Policy of Insurance—
premium—fraud—
pleading.*
Fraud must be specially pleaded to a count to recover back the premium paid for a policy of insurance.

A general verdict was found for the defendants at the trial, the Court considering a case of fraud in obtaining the policies had been established; it was contended for the plaintiff, that the latter was entitled to a return of the premium: this point was reserved.

A rule nisi having been accordingly obtained,

Mr. *Dickens* showed cause and argued.—That as fraud in obtaining the policies in question had been distinctly proved, the premium could not be recovered back; and he referred to 1 Park on Insurance, 456, and the authority there cited, as stating the true rule, viz. “that in all cases of actual fraud on the part of the assured or his agent, the underwriter may retain the premium.”

Mr. *Clarke* contra, referred to *Icely v. Grew* (a) and was stopped by the Court.

SIR L. PEEL, C. J.—The question raised in this matter is whether, under the new rules of pleading, when an action of assumpsit is brought on a policy of assurance, and the plaint contains a count for money had and received, introduced for the purpose of enabling the

(a) 6. C. & P. 671.

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plaintiff to recover the premium, in case of failure to recover the sum insured, it is necessary to plead fraud to that count if the right to a return of any part of the premium be disputed.

The plaint in this action contained a plea of fraud to the count on the policy, which plea as pleaded was not supported by the evidence, though a case of fraud was established in procuring the policy to be effected. There were other issues which went to the merits of the action on the policy, and on two of those the defendants succeeded. It appears to us, both upon principle and authority, that the judgment of the Court on this point must be for the plaintiff. The case must be viewed as if the plaint only contained the count for money had and received. On policies of insurance, as on other contracts, the receipt of money may vary as to its character, under varying circumstances. On a marine risk, as, for instance, a policy effected with a condition to sail with convoy, or to sail on a particular voyage, the premium, if paid, is in the first instance received to the use of the insurer, if the condition be not complied with, it becomes then money had and received to the use of the assured. In like manner in the case of a deposit in the hands of a stakeholder on a wager before the recent statute, the receipt in the first instance would have been to the use, not of the party paying it, but to abide the event of a contingency not then ascertained. On the determination of the event, it would have become money had and received to the use of the insurer, and he might, if there were no illegality in the wager, have recovered the money in an action for money had and received against the stakeholder. But if the wager were illegal, then as to all but his own stake the money in the hands of the stakeholder would be irrecoverable by him, if his right were properly contested. In the latter case, the money received would not vary as to the character of the receipt, but would continue the same in this respect

ab initio. The case of *Potts v. Sparrow* (a) shows that in such a case illegality of consideration must be specially pleaded, and it is in our opinion undistinguishable from the present. (b) The case quoted by Mr. Clarke as decided by Lord Denman at nisi prius is also an authority (though as a nisi prius decision a weaker one) to the same effect; unless this case be an exception it must follow the general rule, and I see no ground for the introduction of an exception. The consideration for the payment of the premium is the undertaking, the risk insured against. The premium is the consideration on the other side. If the risk attaches, the premium must be paid; if not, it will not be payable, or, if paid, must be returned. If the assured has been guilty of fraud in procuring the policy to be effected, he is not entitled to a return of the premium; this is the exception to the general rule, the right to the return is based upon the illegality of consideration, namely, fraud in the contract on the part of the assured. The right to recover, then, rests on proof of the policy having been effected—of payment of the premium, and on noninception of the risk; fraud, of all defences, is most necessary to be pleaded: it would be unfair to the plaintiff to allow his opponent to plead merely want of interest, noncompliance with a warranty, unseaworthiness, or some other defence not imputing fraud, and if he succeeded on any one of these defences, to defeat also the plaintiff's title to recover the premium by the application to the Court for money had and received. Evidence which, unanswered, might raise a case of fraud, might fully have been answered, if the plaintiff had had an opportunity of coming prepared to meet it. There appears to me to be no inconsistency whatever between the rule, which refers to the plea of non assumpsit pleaded to a count for money had and received, (which

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(a) 1 Bing. N. C. 594.

(b) (Note) see *Fenwick v. Laycock*, 1. G. & D. 27.

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is a plea strictly in denial under the new rules,) and the rule applicable to pleas, in confession and avoidance, (such as those which go to defeat a contract in fact,) on the ground that it is void or voidable in law, such a plea of fraud pleaded to a count for money had and received brought for a return of premium, if expanded in common language might be to this effect,—“though it is true that I signed the policy and received the premium, and though I admit the risk never attached and therefore that you are *primâ facie* entitled to a return of the premium, yet I avoid that *primâ facie* case by showing that you contracted fraudulently:” whilst a plea of non assumpsit, if similarly expanded, would state “I deny in fact that any policy was effected, or if it was, I say that the risk attached; and I deny in fact that any premium was received.” The defendant disputing the return of premium on the ground of fraud is in substance relying on an exception founded on that against which the law presumes, and which must be both pleaded and proved. The plea of fraud should therefore in such cases be extended to the count for the return of premium; a verdict must be entered for the plaintiff for the premium on that count, but (as the case of the plaintiff was in our opinion one of a fraudulent character,) without costs.

Rule absolute.

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July 6.

Thursday.

ALLAN and another v. RUSSELL, Secretary, &c.

ASSUMPSIT upon five Union Bank post bills. At the trial it was proved that three of them had been issued for the purpose of raising money for the use of the Bank, and the other two for the accommodation of Cockerell and Co., and Colville, Gilmore and Co. respectively, for the purpose of enabling them to carry on certain indigo factories, previously mortgaged by them to the Bank. They were purchased by one Hastie, who paid full consideration for them to the brokers of the Bank, (Hickey Bailey and Co.) who paid the amount into the Bank. It was also proved that Hastie had been regularly registered as a proprietor, at his own request, and his name entered in the last memorial; and that he had given the instructions under which the shares had been subsequently transferred from his own name to that of another party. The plaintiffs held the instruments as Hastie's agent, he having delivered them after due date endorsed in blank to the plaintiffs, who were his attorneys.

At the trial it was contended for the defence, that Hastie had full notice of the contents of the deed of partnership, by which the issue of instruments of this nature was expressly prohibited; and that the plaintiffs, being merely his agents, and having received them after due date, necessarily stood in the same position. On cross examination it appeared that Hastie had not signed the deed of partnership, but on the contrary had always refused to sign: and it was contended in reply, that therefore Hastie could not be considered as having had notice of its provisions. The Court were of opinion that Hastie must be considered a shareholder, as the Act did not require his signature to the deed prior to entry of his

Joint Stock Company—rights of shareholders inter se—ratification.

Plaintiffs were endorsees of Union Bank post bills from one Hastie, a purchaser for value, and a shareholder of the Bank.—*Held*—that Hastie being himself a shareholder could not sue the Bank, and that plaintiffs, being identified with him, were in consimili casu.

Nothing short of general ratification can prevail against a Bank sued at law in the name of the nominal defendant, when the right to sue is based on ratification by the Bank.

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name in the memorial; and that as the plaintiffs took the bill after due date, they stood in the same position. A verdict was entered for the plaintiffs, with leave for the defendant to move to set it aside on the grounds stated above.

A rule was accordingly obtained, calling upon the plaintiffs to show cause why the verdict found for the plaintiff should not be set aside and entered for the defendant on the following ground, viz. that the payees and endorsees of the notes in the plaint mentioned, as well as the party from whom the plaintiffs took the notes when overdue, and on whose behalf and for whose benefit the action was brought, were respectively shareholders of the Union Bank, and had notice that the issue of instruments of the nature and purport set out in the first and second counts of the plaint was not authorized, and was in direct contravention of the first and second clauses of the partnership deed. (*a*)

(*a*) These clauses were as follows—

“1st.—That the business and concerns of the said company shall consist in issuing promissory notes, payable to bearer on demand at their office in Calcutta, for any sum of not less than Co.’s Rs. 8, and not exceeding Rs. 1,000, and bills of exchange payable at such time after date or sight, as the directors for the time being shall fix, to parties who shall require the same, and deposit the amount of such bills in the said Bank; which deposits shall bear interest at such rate as the directors shall fix: and also in discounting bills and promissory notes not having a longer period to run than four months

from the time of discounting the same respectively, and also in lending money on the security of personal property, for any period not exceeding four months, or on cash account to persons depositing undoubted security, such accounts to be settled at the end of every three months: and in all other branches of business usually transacted by bankers in Calcutta.”

“2d.—That no promissory note shall be issued to an extent exceeding twenty lacks of Co.’s Rupees or exceeding 25 per cent of the paid up capital of the bank, in case the capital shall hereafter be increased beyond 80 lacks of Co.’s Rupees: that no promissory notes or bills of exchange shall be

Mr. *Prinsep* and Mr. *Ritchie* showed cause. The points here are twofold, first.—Hastie, (for whose benefit this action is brought) cannot be considered a shareholder, for he not only did not actually sign the deed, but positively refused to do so. Had Hastie signed the deed, notice might have been inferred, but as the facts at present stand, the inference, (if any) to be drawn is, that he had no notice of the provisions of the deed. Hastie being a *bonâ fide* holder for value, express proof of notice to him should have been given; the more particularly as there is nothing on the face of these instruments to take them out of the ordinary usage in banking transactions. The question then is whether a shareholder, with *implied* notice only of the contents of the deed, is disqualified from suing. The clause in the deed provides that no one shall be a partner unless he shall have signed, with the sanction of the Directors, (a) Hastie therefore cannot, as between himself and the other shareholders, contend he is a partner, and as between creditors and himself he cannot be considered a shareholder. Indeed it is a question whether his executors can claim any portion of the profits of the partnership.

issued, nor bills or notes discounted nor money lent, otherwise than of the description and in manner above mentioned; nor shall any lands, houses or any other species of real or immovable property be purchased by, or on account of the company, or with the funds thereof, for any reason or under any pretence whatever; nor any goods or merchandise for the purpose of making a profit by the resale thereof, nor any other description of tradewhatsoever. Provided &c."

The remainder of this clause referred to matter not touching or

affecting the questions involved in the above case.

(a) The 26th clause provided that "no assignment or transfer of shares should be valid as against the Company until the transfer was registered with consent of directors and certified by the secretary and until the intended transferee of shares should have executed the partnership deed." And by the 27th clause, after the above requisites were complied with, such transferee was to be considered a member.

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Secondly—The second section of the deed is intended to authorise the issuing of post bills, for nothing but such an instrument as this can correspond with the description of security set out in that section. The words used apparently contemplate bills of exchange, but the Court has already decided that they are not bills, but promissory notes. Substantially it comes to the same thing, however, for the form is not material, if the Bank is in any case to be considered the drawer; besides, the ambiguity, if any, must be taken against the maker. [*The Chief Justice*—Suppose that were so, there is no proof that these instruments were issued upon deposit made of the amount.] Not exactly upon deposit made of the amount: but it was proved that consideration was given by the Bank for the larger portion of them. That however is a question with which third parties, even shareholders, have no concern: for they cannot be considered cognizant of the fact of deposit having been made, or of the contrary; or whether these instruments were or not issued wrongfully for the accommodation of constituents. The shareholders themselves by approving of the half yearly reports (in which the issue of these notes is expressly mentioned) and by their receipt of dividends have put a construction upon the deed in favor of their issue. A long course of dealing amounts to ratification generally, and of this ratification a shareholder, being the holder of the security sued on, has as much right to avail himself of, as a stranger. The condition, that the money must be deposited or paid in, may be waived by parol, and has been dispensed with continually. [*The Chief Justice*.—No doubt in equity, partners may by assent, and subsequent conduct, waive the terms of the clauses in a partnership deed, but is that available at law?] It may be a doubtful question whether it be so at law. In equity, deeds of partnership are constantly held to be varied by parol. Here there has been long and

continued acquiescence. [*The Chief Justice*.—Suppose a shareholder to have filed a bill to restrain the improper issuing of these notes, could the party sued, set up the usage against the clause in the deed, prohibiting their issue?] At all events their issue is impliedly authorized, under the words “all other branches of business usually transacted by bankers in Calcutta”: and bank post bills are the very origin of all banking business.

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Mr. Colville A. G. Mr. Dickens and Mr. Morton contra. The argument on the other side is that Hastie never signed the partnership deed, and reference is made to a clause of the deed as disclosing the necessity for the adoption of that course. Now, there is nothing in that clause which prevents a person from being a partner as between himself and his other partners; this is altogether independent of the question of whether he signed the deed; but the fact of Hastie's not having signed the deed is wholly immaterial: if any inference is to be drawn, the fact of his steady refusal should operate to his prejudice. He had taken every step except that of signing, and his refusal to sign showed that he was cognisant of the existence of the deed, and might, or perhaps had in his possession one of the numerous copies printed for distribution among the shareholders, of whom he was one; he therefore stood in the position of a man wilfully declining the means of knowledge available and open to him. There was abundant evidence to support the view the Court had taken at the trial, and which they found as a question of fact: for Hastie was proved to have been a registered proprietor on his own application, his name appeared in the last memorial, and he was in every point of view a shareholder. Then there is nothing to support the supposition (for the argument to that effect amounts to nothing more) that the issue of instruments of this nature were contemplated by the deed.—It has been argued that *

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such may be *inferred*; but the admission of inference against express words of the deed would be too dangerous to allow in a case like this. Then the provision of the deed as to previous deposit, has not been complied with: this is most material, for there is a great difference between issuing these notes after the receipt of cash in deposit, and issuing them for the mere accommodation of constituents, or for the purpose of raising money for the use of the Bank, in an illegitimate manner, and contrary to the terms of the deed; transactions, in fact to provide and guard against which, these provisions were expressly inserted in the deed.

The only remaining question is whether this departure from the terms of the deed has been waived by the shareholders in general. It is impossible to find ratification against all: some of the shareholders may have recognised these transactions, but it is equally clear that many others were altogether ignorant; against the latter no ratification can be proved, nevertheless on a verdict against the secretary, the plaintiff may single out and insert in his *scire facias* any shareholders he pleases.

As to the half yearly reports:—how can any shareholder be supposed of necessity to know that the bank post bills mentioned in them were issued in an improper manner. On the contrary the supposition on reading one of those reports would be that they were bank post bills duly issued after deposit made according to the provisions of the deed. As to general ratification, such an argument may be good quoad the public, but is of no weight in an action by a shareholder. It cannot be contended that general ratification can override the effect of a deed still in force. If the question is reduced to one of ratification, the burden of proof lies on the party alleging it. *Crellin v. Calvert.* (a)

Cur. adv. vult.

(a) 14 M. & W. 11.

SIR L. PEEL, C. J.—This action is brought by the plaintiffs as indorsees against the defendant, sued as the nominal defendant, representing the Union Bank as makers of five several promissory notes. Of these notes, one dated 7th August, 1847, for 23,000 Company's rupees is signed by W. P. Grant and J. Beckwith, directors, in favour of Messrs. Colville, Gilmore and Co., and by them indorsed in blank: another dated 10th August, 1847, is signed T. Caird and ———, directors: and is for 10,000 Company's rupees in favour of Messrs. Cockerell and Co., and by them endorsed in blank: two others are dated each the 10th August, 1847, and are signed by the last named directors in favour of Cockerell and Co. one for 20,000 Company's rupees, the other for Company's rupees 10,000. They are respectively indorsed in blank by Messrs. Cockerell and Co., and the fifth is dated 12th August, 1847, and is signed T. Caird and Wm. Gilmore, directors, and is in favour of Messrs. Cockerell and Co. for 20,000 Company's rupees, and is by them also indorsed in blank. It appears upon the evidence that these Bank post bills were placed in the hands of Mr. Scott, a partner in the firm of Messrs. Hickey, Bailey and Co. in order to raise money on them; Mr. Scott stated that the one for 23,000 Company's rupees was for the accommodation of Messrs. Colville, Gilmore and Co. who received the consideration, and that it was to enable them to carry on their factories pledged to the Bank; and that one was for that of Messrs. Cockerell and Co., and the three others were for the use of the Bank itself: Mr. Hastie, who was a shareholder of the Union Bank, gave value for them, deducting discount and commission, and he was the holder of them at maturity. On some objection being started as to his right to recover on them against the Union Bank, he indorsed them after they became due, and not for value, to the present plaintiffs. The action therefore must be viewed

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as though Hastie himself had been the plaintiff. Hastie became a shareholder in July 1846, the transfer was regularly made to him, at his request, of five shares which he had purchased. The former owner of the shares was omitted in the memorial filed under the Act: and the name of Hastie was inserted in it in lieu of the other. But it appeared that some time after his purchase, Hastie, for some undisclosed reason, refused to sign the partnership deed. It was contended, therefore, for the plaintiffs, that Hastie could not be deemed cognizant of the terms on which the partnership was under the deed to be conducted. It appears to me, however, that his refusal to execute the deed under the circumstances, is as strong an argument of knowledge as of ignorance of the contents of it. His signature to the deed was not essential to constitute him a shareholder, so far as regards the claims of the Bank or of the assignor of the shares or of creditors against him. The provision that the transfer shall not be deemed complete *as against the Bank*, which is contained in the 26th, and the provisions of the 27th section are intended in favour of the Bank against a shareholder as a means of compelling his signature to the deed; and the shareholder cannot by a mere groundless refusal to sign, give himself rights as against the Bank to which the general body of the shareholders would not be entitled. I am therefore of opinion that Mr. Hastie, notwithstanding his refusal to sign the deed, must be viewed in this action as a complete shareholder. The question to be decided is whether such a shareholder can recover against the Union Bank on these Bank post bills.

Before I proceed to the construction of the deed, I shall apply myself to the argument of ratification by the shareholders of a deviation from it. As a shareholder against whom a scire facias issues, in order that execution may be had of the judgment debt against him, cannot plead to the scire facias any thing which might have been

pleaded as a defence to the action, the nominal defendant who represents the whole body of shareholders, is justified in raising, and it is his duty to raise, that defence on the substantial merits which is essential to the protection of every shareholder. There are suits in which individual ratification may be successfully objected to the claim of a shareholder in a joint stock company against the general body when the shareholder objects to a deviation from the partnership deed, as for instance, injunction suits. (*Natusch v. Irving* reported in the appendix to Gow on partnership. (a) In such a case it would be inequitable to allow a shareholder to object to a mode of conducting the business, and to trammel its consequences, which his own acquiescence had encouraged and brought about. But in an action at law against a nominal defendant representing the whole body of shareholders, no question of individual ratification can arise: for it cannot then be known against what shareholder or shareholders the judgment will be executed, if the effects of the bank prove deficient. After judgment no shareholder could raise this defence on the scire facias, that the bank was not bound by the signature of the directors to instruments of the nature sued on. It follows, therefore, that nothing short of a general ratification can prevail against the bank sued at law in the name of the nominal defendant, when the right to sue is rested on ratification by the bank.

The judgment of the Court in the former case steered clear of the ground of ratification. It proceeded on these grounds, that the issue of the notes was within the ordinary scope of business of such a bank of issue, and that the parties suing the bank were not shareholders, but third persons *bond fide* holders for value and without notice, that the bank post bills were securities, the issue of which in the form in which they were issued of pro-

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(a) p. 398, 407. 3d Edit.

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missory notes was prohibited by the deed. It was argued that the act of the Indian legislature was notice to them, and this argument was resumed on the occasion against the present plaintiffs, but I adhere entirely to the opinion which the Court then expressed on the authority of *Brett v. Beales*, (a) and the reason of the thing, that a recital in an act private in its nature is neither evidence nor notice against third parties; and when a shareholder sues, a resort to a weaker kind of constructive notice is not needed. The present plaintiffs are identified with Hastie, who was a shareholder. I have already stated that in my opinion no difference exists between his case, and that of a shareholder who has signed the deed. If any one of the shareholders represented by the nominal defendant is entitled to say, as to the issue of these promissory notes, "it is an unauthorized issue as against me," the action must fail. Now many shareholders have joined after the issue of these notes, and it is to be presumed that they have signed the deed. The deed would tell them the covenants and engagements into which they were entering. They may be presumed cognizant of them on the signature, or without it by the transfer to them. It was urged they had notice also of the waiver, evidenced by the frequent issue of these notes. Here it is important to observe in what terms the directors speak of the issue of these "promissory notes." They term them "bank post bills of exchange" in the notice of January 1847; that of July contains no particular reference to them. The notice is not a notice of the issue of prohibited promissory notes, so far as the terms of it go: and a bank post bill is not necessarily a promissory note, and some are issued by other banks which are bills of exchange. The pass books are only notice to those who keep accounts with the bank, and

(a) 1. M. & M. 426; 8 Law. J. KB. (s.c.)

even these are silent as to the nature of the bank post bills. The report states further that the bank post bills are issued for cash or on approved banking securities. This is not upon the evidence established as to all the bank post bills on which this action was brought, for as to two, the evidence shows that they were in effect accommodation notes. With what propriety could a partner, though assentient to an issue guarded as stated in the report, be deemed assenting to issues, when those safeguards were relaxed or abandoned?

No proof is given in this cause of any particular pressure on the Union Bank at that time, or of any inability to raise money for the necessary purposes of the bank by the issue of authorized securities, or in any other mode authorized by the partnership deed, nor is any evidence given of any approved banking security having been given for the two notes issued and made payable, the one to Messrs. Colville, Gilmore and Co., and the other to Messrs. Cockerell and Co. proofs which it lay on the plaintiff to give to establish his case of ratification. The transaction is one in which the bank are raising money on a discount of its bank post bill; a state of things not glanced at in the report. The only principle upon which as between partners themselves, any deviation from a deed of partnership is allowed is this, that their dealings show that they have all assented to the business being conducted in a different mode. Whether this principle which is clearly established in equity, as to private trading partnerships, is capable of being applied to a joint stock company, with constantly shifting partners, who are required each on his introduction to sign the partnership deed, appears to me to admit of much doubt. But before any deviation can be admitted, there must be clear evidence of the assent; and that the assenting party understood the real position of things; an assent given whether expressly or impliedly upon an incorrect representation of

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facts may be retracted, and an assent under given circumstances cannot be enlarged so as to embrace new risks subsequently arising, and as to which no such assent has been required or given. I am, therefore, of opinion that the ground of ratification fails, and that the case rests on the terms of the deed, and the existence of authority which it confers. The first and second sections of the deed taken together clearly prohibit the issue of these promissory notes. It is useless to speculate on the reasons for the prohibition of promissory notes where bills of exchange are not in terms prohibited. The prohibition itself is clear and distinct; consequently in the terms of the deed itself the directors had not authority to bind the bank by affixing their signatures to these instruments. The plea involves the question of authority to bind the bank by the signature of the directors.

By the deed itself, the authority is not conferred, promissory notes for not less than 8 and for not more than 1,000 Company's rupees, each payable on demand, may be issued. Bills of exchange at such dates as the directors may appoint may be issued at the request of the parties; who shall require the same, and deposit the amount in the bank, &c., by a subsequent extension of the clause regularly and legally made, the bank was empowered to buy and sell bills of exchange on England.

The case of *Hawken v. Bourne*, (8 M. and W. 710,) expressly establishes the distinction between the claims of third persons not affected by notice and the claims of partners or others affected by notice. In that case Mr. Baron Parke says: "Any restriction which by agreement amongst the partners is attempted to be imposed upon the authority which one possesses as a general agent for the other, is operative only between the partners themselves: and does not limit the authority as to third persons who acquire rights by its exercise unless they know that such restriction exists". The

advances made by Mr. Hastie which came to the use of the bank will constitute a debt from the bank to him. These plaintiffs have no connexion with that claim and can sue only on the notes themselves. A prudent man would be guided on joining a company of this sort by the nature of the restrictions imposed by the partnership deed on the power of the directors, and would be less likely to join a company where all is left to the discretion of the directors, than one in which salutary restraints are placed upon their power. A person knowing that he is required to sign the partnership deed ere he becomes a complete partner, would naturally look to that as containing the covenants and agreements by which the partnership is to be regulated, and would not be put upon enquiry as to a practice in fact at variance with it. He could not reasonably be held to assent, by relation, to antecedent violation of the deed, of the very existence of which he might be in fact ignorant. Many partners may join who are not locally resident in the place, and who may not have had previous knowledge of any course of dealing at variance with the provisions of the deed. It is the duty as well as the interest of every shareholder in concerns of this kind, not to sanction any, even a slight, deviation from the partnership deed in an unauthorized manner. Such deviations grow by little and little, and in time every security may be practically impaired. The inferior officers seeing how lightly their superiors regard limitations on their authority, may follow the pernicious example to fatal lengths, and mere breaches of trust may lead to the commission of crimes.

Rule discharged.

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Nov. 16.

Thursday.

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BHOBOSOONDEREE DABEE

v.

THAKOORDASS MOOKOPADHIAH.

*Pleading — pay-
ment — amendment
— plea rule 9.*

When the evidence shows a larger payment than the sum actually pleaded—the plea cannot (under plea rule, 9.) be amended by inserting the larger amount. But a new trial will be granted on terms.

DEBT and detinue for household furniture and other articles. Pleas—non-assumpsit, non-detinet, and a special plea “as to Rs. 500 parcel of the monies claimed, a settlement of accounts and payment thereon before action brought.” The plaintiff (who was the widow and administratrix of one Greejabhoson Mookerjee) sued the defendant for recovery of a quantity of personal property, consisting of furniture, wearing apparel, and other articles (inherited from her deceased husband,) and which shortly after his death in 1842, she had deposited with the defendant for safe custody and for sale, the proceeds to be paid to the plaintiff. A list of the articles delivered to defendant was made out at the time and signed by him. A portion of the property was afterwards sold, the proceeds of which amounted to about Rs. 2,000.

For the defence, it was proved, that the defendant was the agent of Gopaloll Tagore (one of the sureties to the Court in the administration bond given by the plaintiff on taking out administration to her husband’s effects,) to whom she had delivered the goods, and from whom the defendant had received and taken charge of the same. Upon certain disputes arising between the plaintiff and Gopaloll, with respect to the estate of Greejabhoson, all matters in difference were referred to the arbitration of Beernursing Mullick (an opulent and respectable Hindoo) who eventually decided that Gopaloll should pay a certain sum to the plaintiff: this sum included every claim of the plaintiff bearing reference to the property of her late

husband: Gopaloll gave the plaintiff a hauchittee or note of acknowledgement for the amount.

The Court thought a privity was established between Bhobosoonderee and Thakoordass, and found for the plaintiff on the plea of non-assumpsit; with respect to the plea of payment, however, as the amount mentioned in its introductory part was limited to Rs. 500, parcel &c. the Court observed that a verdict for more than that sum could not be entered.

Mr. *Morton* (for the defendant) applied to amend by substituting the larger sum. (a) This was refused; but the point was reserved. A rule having been subsequently obtained—

Mr. *Clarke* and Mr. *Ritchie* showed cause, and were stopped by the Court.

Mr. *Morton* and Mr. *Taylor* in support of the rule. The amount inserted in the plea not being material, there is no obstacle to the amendment proposed. This is essentially a variance merely between the proof and the record, and no prejudice arises to the other side. [*The Chief Justice*.—We think you are entitled to a new trial upon payment of costs. But we doubt our power to amend.] The plea is in some respects a plea of part payment, that is to say quoad the sum referred to, but the plaintiff in his plaint claims a nominal round sum, and the defendant, not knowing exactly how much it is alleged he has actually received, admits he has received something, but not more than to the value of Rs. 500, and that, he says, he has repaid; thereby meaning, that he has repaid all he ever received.

[*The Chief Justice*. No—he says “as to *part* only of

(a) 9th Plea rule (2 Sm. & Ry. terms of 3 & 4. W. 4, c. 42, s. 23. Rules & Orders 49) following the

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what is claimed he paid to that amount :” judgment might have been signed for the residue, unless it had been covered by some other plea.] The amount of claim usually inserted in the plaint never is, nor is intended to be, the exact sum claimed ; on the contrary, it is generally very much exaggerated. Here, the plea is to the effect that on a settlement of accounts the defendant repaid what he conceived to be the entire claim against him. In his defence he so treats it ; he may not know, perhaps may not have the means of knowing, *precisely* what he has repaid : he may have been deceived in his calculation. On the evidence it appears that the sum paid in was really larger than the defendant supposed : it seems, therefore, but just that the amendment should be made to meet such a case : after all, the only question is whether the plaintiff would be prejudiced by such a course : it is clear he would not.

SIR L. PEEL, C. J.—We think the power of amendment applies only to cases where there is a variance between the averments and the proof, not altering the character of the issue : it ought not to be extended so as to allow a party to obtain an amendment to suit his pleading according to the shifting character of the proof. It is obvious, that where a defendant pleads payment of a certain sum, and the evidence discloses that payment of a larger sum was in fact made, the opposite party does not come to meet a case of payment of that larger sum, although he might anticipate proof of a smaller.

The defendant is only entitled to a new trial on payment of costs with liberty to amend the plea ; leave being also given to the plaintiff to amend his replication, if so advised.

Rule accordingly.

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Wednesday.

August 23.

THOMAS FEWSON *v.* A. P. PHAYRE.

TRESPASS for false imprisonment. Plea. Not guilty by statute.

The action was brought against Capt. Phayre (who was principal Assistant Commissioner at Moulmein in the province of Tenasserim) for an alleged false imprisonment under the following circumstances :

On the 8th of April 1847, one May Flower Crisp, of Moulmein, made an oral complaint before the defendant, alleging that the plaintiff was indebted to him (Crisp) in a certain sum of money, viz. Rs. 4,500; at the same time stating upon oath, that the defendant was about to sail forthwith for Calcutta in a vessel of which he was commander. The defendant thereupon issued a summons, dated the 8th of April, requiring the plaintiff to appear before him at 10 o'clock in the forenoon of the same day at the suit of Crisp, to answer the claim, and at the same time the defendant issued the following warrant.

“ To the Constable J. Neville—

“ Mr. Crisp having appeared before me this day and made oath and satisfied me that Mr. Fewson is intending to remove from the jurisdiction of this Court, you are hereby directed to apprehend the said Mr. Fewson, and cause him to appear before me; and this shall be your sufficient warrant and authority.

“ A. P. PHAYRE.”

It appeared by the evidence of the constable that he did not receive the summons and warrant until half past five in the afternoon, when he went to the plaintiff and served the summons on him, and on his expressing dissatisfaction at being required to accompany the

In an action for false imprisonment under the warrant of the judge of a civil Court in the Tenasserim Provinces, against such judge, (assuming such province not to be annexed to the presidency of Fort William,) it is not sufficient for such judge, in order to entitle him to the protection of 21 G. 3 c. 70 s. 24 to prove that he acted as judge of a Court which *de facto* exercised jurisdiction on the subject matter in respect of which the imprisonment took place, but it is necessary for the defendant to give some evidence of the origin, and constitution of such Court, or to show that it had some legal foundation for the exercise of such jurisdiction.

Semble.— The Tenasserim Provinces not having been annexed to the presidency of Fort William, British subjects resident there, are not, on that account alone, subject to the jurisdiction of the Supreme Court—and are not, by reason of their character of British subjects alone, entitled to any exemption from the Courts, (legally constituted), of those provinces.

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constable, the latter showed him the warrant, upon which the plaintiff at once acquiesced and went with the constable to the house of the defendant, and thence to the abode of a friend of his, some miles off, where they found the defendant. This was late at night and considerably after office hours. The defendant then required the plaintiff to give bail, but on his refusal, stating that it would be impossible to do so at that late hour of the night, especially as his friends were at some distance, the defendant sent him to jail, and wrote an order across the warrant, directing the jailer to receive him into custody. The civil suit was tried the next day and decided in the plaintiff's favor. In the mean time the vessel of which the plaintiff had been appointed commander had sailed, having started under steam that day for Calcutta, in consequence of which the plaintiff lost his passage, as well as the advantage and benefit which would otherwise have resulted from his command of the vessel. It was proved that the plaintiff was an Englishman, and had commanded several British registered vessels, and also served in the China war. He was also an agent of Lloyds at Moulmein. Some evidence was offered to the effect that Moulmein was an extra-territorial place. The provinces however had been treated for all purposes of administration as if forming part of the presidency of Fort William, though the usual course of annexation by "proclamation" had never been pursued; no act or regulation of Government had ever been passed affecting the Courts at Moulmein, but jurisdiction had in fact been exercised over British subjects as well as natives and certain local rules for the civil and criminal Government of the provinces had been promulgated, having (a) been first passed by the Governor General in Council.

(a) Appeals were allowed from Goungoups, to the Courts of the the Courts of certain native judicial officers, called Tseekays and Assistants to the Commissioners and from the latter to the Com-

The Court nonsuited the plaintiff, reserving liberty to move to set that nonsuit aside and enter a verdict for Rs. 100 damages (contingently assessed) on the ground that the defendant had acted without jurisdiction. A rule was accordingly obtained against which :

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Mr. *Clarke* and Mr. *Ritchie* showed cause. As the arrest in question took place under process issued by the defendant, a judge of a Court, such arrest was a judicial act, in respect of which the defendant was protected by the statute 21 Geo. 3. c. 70, s. 24.

The plaintiff was not in any manner privileged by reason of his status as a British subject so as to be exempt from the ordinary civil jurisdiction of the local Courts at Moulmein. If indeed Moulmein had been proved to be a place annexed to the Presidency of Fort William, the plaintiff, as a British subject resident there, would be subject to the jurisdiction of the Supreme Court, and the local Court would not have had jurisdiction against him; and if the defendant had had notice of his being a British subject, he might, within the principle laid down in *Calder v. Halkett*, (a) have been liable to an action for entertaining the case after such notice. But the foundation for that argument wholly fails. In the first place Moulmein has never been annexed to the Presidency of Fort William within the meaning of the 39 & 40 Geo. 3, c. 79, which gives jurisdiction to the Supreme Courts. To effect such annexation a public act of State of some kind is necessary. It has been the custom accordingly on the occasion of annexations of other provinces, either to announce the fact of annexation by a public Proclamation in the Government Gazette (as in

missioner's Court, and from the Commissioner's Court to that of the Sudder Adawlut, but no original or primary jurisdiction whatever was conferred on the Commis-

sioner or assistant Commissioner either as against Natives or British Subjects.

(a) 2 Moore P. C. C. on appeal, 293.

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the case of Serampore in the year 1845) or, before the charter act, by Regulation of the Supreme Government, declaring that the province is annexed, and that the body of the Regulations for the Province of Bengal is applicable to it. Until some such act, the province, although for all purposes of administration it may be treated as a Bengal province, is in fact an Extra Regulation province, and does not regularly form part of any of the Provinces. The Tenasserim Provinces are precisely in that predicament, and therefore British subjects, resident there, are not on that ground alone subject to the jurisdiction of the Supreme Court. If not it follows as a necessary consequence that they are subject to the local Courts of the place ; for the general rule is that a man owes obedience and is subject to the Courts of the country where he resides, and under the protection of whose laws he dwells, and the rule which exempts a British subject from the jurisdiction of the local Courts within Bengal is not an exception, but an illustration of the general rule, because in that case this Court is for that purpose considered the Court of Bengal having jurisdiction over him. But to a British subject at Moulmein, considered as an unannexed province, this Court and the other Supreme Courts of India, are as much foreign Courts as the Courts of the Mauritius would be ; he is therefore plainly and by necessity recognized by the law of nations subject to the jurisdiction of the Courts of the place where he resides—as he would otherwise be exempt from all law whatsoever. That being the case, it is immaterial to enquire how this Court was originally instituted or to define precisely the limits of its jurisdiction ; it is sufficient to show that it is *de facto* an existent Court, exercising jurisdiction in similar cases by the same kind of process as has been adopted here, and it is not necessary, as is contended by the plaintiff, to trace its origin either to its creation by the Crown or the East India Company, or to a period beyond the limit of legal me-

mory. There are cases in which it has been shown that a legally constituted tribunal existed, which had been displaced by a judge irregularly appointed and where it has been proved by the party impugning the jurisdiction of such judge, that he was not a judge *de jure*, and that there was another tribunal to which he would have been properly amenable, in such cases it has been held that the defendant could not protect himself merely by the circumstance of his acting as a judge *de facto*, though *bonâ fide*. There the illegal origin of the Court was proved; here it is not even suggested. There is no pretence for urging that there was any other tribunal to which the plaintiff could have been properly subjected, and therefore it was quite sufficient at least *primâ facie*, to prove that the Court was the only existing one *de facto* in which such cases were entertained. Even however if the defendant was not protected on these grounds, it has not been sufficiently shown that the defendant had any notice that the plaintiff was a British subject, and it lay upon the plaintiff to prove that the defendant knew, and had the means of knowing, of the defect of jurisdiction; and consequently the defendant would be protected under the rule established by *Calder v. Halkett*. [*The Chief Justice*.—We found as a fact at the trial that the defendant had such notice, and if you dispute our finding on the point, the plaintiff would be entitled to a new trial, for the purpose of submitting the question of fact again to us.] Then again even if the plaintiff were exempt from the jurisdiction, and such notice were established, the Court will have to determine the question which was left open by the Privy Council in *Calder v. Halkett*, where Parke B. says “it is unnecessary to determine whether, if distinct notice had been given by the plaintiff to the defendant, or proof brought forward that the defendant was well acquainted with the fact of his being British-born, the defendant would have been protected in this case, as being in the

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nature of a judge of Record, acting irregularly within his general jurisdiction, or liable to an action of trespass, as acting by virtue of a special and limited authority given by the statute which was not complied with, and therefore altogether without jurisdiction."

It is submitted that the defendant was here, (even if the whole argument on the other side be conceded) acting not merely under a special or limited authority, but within his general jurisdiction, from which the case of a British subject merely formed an exception, and that he was therefore protected by the statute. Lastly it may be questioned whether, although the plaintiff's Court is not put within the list of those expressly specified in Mr. Macaulay's Act (No. XI. of 1836) giving jurisdiction over British subjects in civil cases, to the Courts there enumerated, it does not fall within the meaning of that Act, as it exercises in all respects similar jurisdiction to some of those Courts, only differing from them in name.

Mr. *Morton* and Mr. *Skinner* contra—contended that it was sufficient for the plaintiff to show a *prima facie* case, by proving the trespass complained of: then, as there was no regulation or act relating to the establishment or the powers of the Assistant Commissioner of Moulmein of which the Court could take judicial notice, and as jurisdiction could not be *assumed*, it was incumbent on the defendant to prove the nature and extent of the jurisdiction, under which he had acted. Having failed to do so it was obvious, he had acted wholly without jurisdiction, *Carratt v. Morley* (a), *Collett v. Lord Keith* (b).

The Court took time to consider, and judgment was now delivered by—

SIR L. PEEL C. J. This was an action of assault and false imprisonment brought against Captain Phayre, the

(a) 1 Q. B. 18. 1 G. & D. 275 (b) 2 East. 260.

(S. C.)

Assistant Commissioner of the Tenasserim Provinces. The defence was that the alleged trespass complained of, viz. an arrest and imprisonment under process, issued by that gentleman, as the Judge of a Court at Moulmein, was an act done by him judicially, and was therefore not actionable.

The plaintiff and defendant are both British subjects, resident in Moulmein. It did not appear whether the plaintiff had ever been resident in the province of Bengal Behar, or Orissa, or in any of the places subsequently annexed to them. Upon the evidence it appeared that Moulmein is not annexed to this or any other of the presidencies: that it has been treated as an Extra Regulation place. It was further proved, that whenever the Government has made annexation, it has been done by Proclamation, and it is obviously the proper and convenient course of proceeding in a matter of such great importance. It would be most inconvenient to have to presume an annexation from acts otherwise inexplicable. The Court therefore adheres entirely to the opinion that it expressed on the trial, that on the evidence for the purposes of this action, Moulmein must be viewed as a place subject, but not annexed to this Presidency. British subjects resident in such places who have once been resident in Bengal, Behar, or Orissa, or the places subsequently annexed to them, are subject to the jurisdiction of the Supreme Court; but British subjects who have not been resident in Bengal, Behar, or Orissa, or the places subsequently annexed to them, would not, whilst resident in Moulmein, or any other place similarly circumstanced, be subject to the jurisdiction of this Court in civil actions. If such a person as is lastly described, were held exempt from the jurisdiction of the local Courts, he would be subject to no jurisdiction of any Indian Courts. I adhere to the opinion which I expressed at the trial, that a British subject merely as such cannot, in such a

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place, claim exemption from the jurisdiction of a Court of civil jurisdiction legally erected. He can legally claim exemption from the application to his case of the old laws of a conquered or ceded province, when they are in their nature at variance with the general rights of a British subject. In such a case the old laws do not remain in force as against him. This doctrine, of which the germ is found in Colvin's case, although Lord Coke's doctrine was denied by Lord Mansfield in the case of *Campbell v. Hall* (a) to some extent, as proceeding from the narrow and illiberal views of the old times, in which heathens were regarded as enemies, is, however, when properly qualified, supported by modern authority. The case of *Donegane v. Donegane*, vol. 3 Knapp's cases, p. 69 and note, may be consulted on this subject. The ancient laws of a conquered or ceded province remain in force until altered by the conqueror or power to which the cession is made. But there are important qualifications of this doctrine; laws from their peculiar nature uncommunicable to the subjects of the conqueror, are not in force as to them. In Governor Picton's case, the legality of the application of the torture, in a judicial proceeding, to one of Spanish extraction, a native of the island, which barbarous proceeding was legal under the Spanish laws, under the sovereignty of the crown of Spain, was much discussed. The point was never decided, but it was not doubted, that its application to a British subject would have been a flagrantly illegal act. This view of the subject is ably enforced by Mr. Cameron, in his able dissertation on the *lex loci*, and I agree in general with the conclusions of that learned and able writer, on the limitations with which the doctrine of Lord Coke is to be received, and of the legality of it at this day with such limitations. Laws such as those of

(a) 2 Cowp.

the Mahommedan and Hindoos are, for the most part incommunicable to the British subject. The same may probably be said of the laws of the people inhabiting these ceded provinces at the time of the cession. In this case the plaintiff has no cause to complain of the application to him of any inapplicable laws, for the whole proceeding bears the closest resemblance, both in procedure and substance, to the English law in a like case. The *exparte* application for a process of arrest against his person, its issuing *exparte* on an allegation of an intended departure from the jurisdiction, and of a debt due, the manner of the service, the signature by the judge at a private house but within his local jurisdiction, the temporary detention,—all these things are some of daily, others of occasional, occurrence under the English system. No blame is imputable to the judge that he acted on the information of an applicant. If the cause of action were groundlessly and mischievously trumped up against the plaintiff, it is in no way imputable as an error of judgment or as implying want of discernment, that he did not discover this on an *exparte* application. Still more unreasonable is it to expect him to institute a preliminary inquiry, whether the applicant is, by reason of want of religious belief or other disqualifying cause, one whose testimony it would be improper to trust. But even if any misapplication to the plaintiff in this action, of a law not properly applicable to him, had taken place, that would constitute merely error, not want of jurisdiction over the subject matter or the person: nor would any harshness or severity in the exercise of his jurisdiction constitute the judge a trespasser. In justice, however, to the defendant, I state my opinion, that he is blameless throughout this transaction.

At the trial no evidence was given of the time of the erection of this Court. It appears not to have been one of the ancient courts of the place. It was not proved

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by what authority it was erected, or what jurisdiction over matters or persons was conferred upon it. Upon the arguments it was admitted by the defendant's counsel, that no legislative regulation by the Indian Government erected or regulated it, that no act of the Indian legislature constituted it, and no statute law is applicable to it. An Act of the Indian Legislature (No. 2 of 1835) was referred to, (a) but that Act is couched in the most general and indefinite language. It refers not to any Courts particularly, it does not purport to have been passed with the view of legalising any Courts, of the legality of the constitution of which doubts were entertained; it confers on the Sudder Dewanny Adawlut, the Nizamut Adawlut and on the Sudder Board of Revenue, powers of supervision and control over functionaries, and by which I understand judicial functionaries and their subordinates. In practice, this act (notwithstanding, I believe, the doubts, and if so the just doubts of the Sudder Dewanny Adawlut,) has been construed as creating an appellate jurisdiction, which if established by such construction must necessarily be unlimited, extending to the most trifling matters, civil as well as criminal. (b) But whatever be the true construction of this act in other

(a) The following is a copy verbatim. "Be it enacted, that the functionaries who are or may be appointed in the provinces of Assam, Arracan, and Tenasserim, be henceforth placed under the control and superintendence, in civil cases, of the Court of Sudder Dewanny Adawlut, in criminal cases of the Court of Nizamut Adawlut, and in revenue cases of the Sudder Board of Revenue; and that such control and superintendence shall be exercised in conformity with such instructions as the said functionaries may have received, or may hereafter receive, from the Government of Fort William in Bengal."

(b) The Sudder judges doubted (as well they might) whether these general expressions gave them an appellate jurisdiction, but they have since entertained appeals, on learning (by reference to the government) that it was *intended* that such should be the effect of the Act.

respects, no rule of construction would warrant me in treating it as establishing the legality of every then *de facto* judicial establishment in the Province, a subject not even glanced at by the act: on the subject of jurisdiction it is also wholly silent. It was proved that this Court had existed for some few years: the evidence relating to it did not go back beyond 7 or 8 years. It was proved to have exercised in fact jurisdiction over British subjects, and to have exercised jurisdiction over subject matters of complaint, similar to that urged against the plaintiff on the action in the proceeding before the defendant. At the trial I thought that I might presume *primâ facie* from the actual exercise of jurisdiction, the legal constitution and jurisdiction of this Court, and that it lay on the plaintiff to show its illegality. On further consideration of the subject, however, and after the able argument for the plaintiff, I am of opinion, such presumption could not legally be made; the plaintiff alleges a trespass to his person, if in practice he proves the warrant or other authority for the arrest, issued by the judge, whom he sues, it is merely to connect that officer with the actual doer of the wrong, of which he complains. If in fact the judge arrested with his own hand, or imprisoned by his own direct act, it would be unnecessary for the plaintiff to prove in support of his case any part of the Court's proceedings. The statute law permits the defendant to plead the general issue. That privilege, if such it can be called, does not shift the burthen of proof or lighten it. This Court has no judicial cognizance of the law in a place circumstanced as Moulmein. It cannot take judicial notice of the extent of jurisdiction of the Courts established there. The laws and the jurisdiction of Courts must, where necessary, be established by evidence. Neither foreign laws nor the laws of a plantation abroad, are judicially noticed by the judge. (Starkie on evidence, 1 vol. p. 400-401-402-403 and the cases quoted

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in the note.) A Court very recently established as the present, cannot be supported by presumption of a legal origin. Ancient rights and franchises, of which enjoyment has been had, will be ascribed to any legal origin, from which they might have proceeded. Lord Mansfield in one case went so far as to say, that if necessary he would presume an act of Parliament. But the resort to this presumption is justified by the consideration alone, that the evidences of the grant may have been destroyed by time. The law makes in general an intendment *omnia rite esse acta*, in favor of the acts of judicial officers. It presumes an appointment from the fact of acting in the office, and thus Captain Phayre might have been proved to be the judge of this Court, by proof that he acted as such, or a subordinate officer in like manner. But when a new Court is established, and its jurisdiction is disputed, the law does not presume from mere actual exercise a rightful exercise. A judge *de facto* in a Court *de facto*, but illegally constituted, has no immunity from action for acts done in his supposed judicial capacity—see *Gahan* and others v. *Lafitte*, 3. Moore's Reports, P. C. 382. I think that the defendant as *de facto* judge of a Court created within a very few years back, was bound to show, by some evidence, how the Court was constituted, and to give some explanation of the origin of its jurisdiction. To show the inconvenience and danger in such a case of a resort to presumption these considerations may suffice. To what origin must the attention of the judge direct itself? He must presume something as to its origin. It is the prerogative of the Crown to create Courts. The power of creating new Courts may have been conferred on another body; it may have been so conferred, that a co-ordinate power may have been returned in the Crown; Moulmein is within and under the sovereignty of the British Crown as a conquered or ceded Province. The Crown would have power to make law for it by orders in

Council, unless the exercise of that power would be in derogation of any of its charters to the East India Company. In the latter case has the delegated sovereign the power? or is it unexercisable? If the law-making power exists by reason of the delegated sovereignty (I speak not of the Indian legislature, which has not legislated on the subject) by whom should it be exercised? By the Governor General in Council or sole? These and other questions must in their turn all be considered and decided on in the mind of the judge, to lay even a foundation for a presumption. The origin presumed by him may, however, be a total variance with the real origin. No justifying cause exists for a resort to presumption in the case of a Court of a very few years existence, in a new dependency of the same general Government, where some evidence may easily be had of its origin and the nature of the jurisdiction conferred upon it. I do not decide that the Court is illegally constituted, or, if legally constituted, that it has not power to decide between British subjects in civil causes, whether they be or be not subject to the jurisdiction of this Court, but I think that I was in error in acting on the doctrine of presumption to the extent to which I carried it, and therefore the rule must be absolute to enter a verdict for the plaintiff for the damages contingently assessed by consent—unless the defendant should prefer having a new trial, on the payment of the costs of this trial, which he may have if he think that he can establish the legal constitution and jurisdiction of the Courts as actually exercised.

Rule absolute.

Note.—The latest case upon this subject is that of *Houlden v. Smith* 19 Law. J. Q. B. 170 decided February 1850, where most of the authorities, (directly and indirectly applicable) are referred to.

In *Houlden v. Smith* it also appears that a defendant intending to avail himself of a special defence under “not guilty” must note the words “by statute” in his plea.

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Friday.

Pleading—Practice—difference between procedure of Mofussil and Sup. Court. Lis pendens.

The pendency of another suit in the Mofussil between the same parties, in respect of the same subject matter, is not pleadable in bar, to a suit on the equity side of this Court, the system and practice of procedure in the two Courts being different,

In Equity.

MUTTYLOLL SEAL

v.

JOYGOPAUL CHATTERJEE and others.

THE complainant was assignee of a mortgage of 3-5ths of a talook called Poranbatta in the Zillah of Burdwan. The entire talook had been originally bequeathed by one Tarrachurn Chatterjee, a Hindoo, as a joint and undivided estate to his five sons, two of whom sold their shares to the defendant Joygopaul, who, at the same time reconveyed to them by way of mortgage, their 2-5ths, together with the 1-5th inherited by himself, as a security for due payment of the purchase money, which was payable by instalments, the whole to be due on one default. On failure in payment of a particular instalment Muttyloll Seal filed his bill of foreclosure, and coterminously therewith his plaint in ejectment. The usual decree nisi for foreclosure was obtained, fixing payment of the mortgage money in September 1846. In August of that year complainant obtained possession in ejectment, and entered into receipt of rents and profits. In April 1847, the talook was sold for arrears of Government revenue. The sale realized Rs. 38,100 and the revenue due (amounting to Co.'s Rs. 1,877) being deducted therefrom, the balance, Rs. 36,223, was deposited in the collectorate to the credit of the defendant Joygopaul, (who was the registered proprietor of the whole talook, 3-5ths on his own account, and of 2-5ths as trustee for his two younger brothers.) The decree nisi for foreclosure was made absolute on non-payment at the appointed time, but was afterwards (a) set aside for irre-

(a) See *Muttyloll Seal v. Joygopaul Chatterjee*, ante 105.

gularity, on the ground that no account had been taken before the master of the rents and profits which the mortgagee had received subsequent to his entry, which was after the computation of the principal and interest by the registrar. Joygopaul then applied to the collector for payment to himself of the above mentioned balance; but was restrained by a writ of injunction obtained by the complainant on a supplemental bill filed with that object. (a)

An amicable arrangement was subsequently made between the parties, on the terms, that the bill of supplement should be dismissed, and the injunction dissolved, and that Joygopaul should execute a mooktearnameh authorising the complainant's mooktear to receive the money out of the Burdwan collectorate, and to pay over the 3-5ths share, i. e. Co.'s Rs. 21,784, to the complainant. The mooktearnameh was duly executed by Joygopaul accordingly, and sent up to Burdwan, but was found to be irregular (the date being omitted) and thereupon a second mooktearnameh was executed and sent up to the complainant's mooktear; the supplemental bill was dismissed, and the injunction dissolved, according to the compromise. On the mooktear applying however for payment, Joygopaul appeared in person, and, in breach of all good faith and honesty, denied his signature to the mooktearnameh, and again applied for payment to himself; urging that the previous injunction having been dissolved, the only obstacle was now removed. Upon this, the collector refused payment to either party.

The present bill was filed praying specific performance of the agreement, and that Joygopaul might be restrained from applying for payment to himself, or opposing payment to the mooktear under the mooktearnamehs. The defendant Joygopaul pleaded in bar, that the complainant

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(a) See *Muttylohl Seal v. Joygopaul Chatterjee*, ante 172.

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nant had, prior to filing the present bill, instituted another suit in the zillah court of East Burdwan (a court of law and equity duly constituted, and having competent jurisdiction in the matter,) against the same defendants, in respect of the same subject matter, and for the like relief; to which suit the defendants had appeared, and answered: which suit was still pending.

The plea was set down for argument.

Mr. *Prinsep* and Mr. *Ritchie* in support of the plea. A suit pending in a mofussil court is a bar to the institution of a suit for the same cause of action between the same parties in another Court. It may be urged on the other side that the Mofussil Courts are foreign Courts. It is submitted that they cannot be so considered, but must necessarily be assumed to be courts of collateral and concurrent jurisdiction, as this Court takes judicial notice of the regulations by which they are governed. [*The Chief Justice.* How do you show that this is a Court of Equity? The Courts of Durham, Lancaster and others are purely Courts of Equity, and their proceedings are analogous to those of our Court. If the Mofussil Court, although by virtue of another system, has the power of dealing out the same Equity as this Court has, then the pendency of the other suit might be a good bar. The question is whether the plaintiff in the suit in the zillah Court can obtain the same advantage as in this Court.] [Mr. *Justice Colvile.* The question here is, not whether the zillah Court is a foreign Court, but whether the complainant can have the same discovery and relief there, as in our Court of Equity; the zillah Court cannot compel a full discovery and answer of the defendant on oath.]

If the practice of the two tribunals is different, evidence of that ought to be substantively before this Court. [*The Chief Justice.* The Mofussil Courts decide according to equity and good conscience, and are not bound

by precedents. Suppose in England a case pending in a court of conscience, could you plead that fact, if sued in the higher court of equity?—the principle is the same, although the latter would not take cognizance of the smaller amount.] The relief prayed here is an injunction. [*The Chief Justice.* The zillah courts do not grant injunctions.] A roobecarree has been issued, which may be considered as equivalent to an injunction, and of similar nature and force, as it is a sort of stop order on the collector not to pay the money in dispute until final decree. A court of equity will not entertain a suit for the same matter, if pending at common law, and if the plaintiff can have the like redress there. The complainant can have in the result, the same relief and redress in the zillah as in the Supreme Court; moreover the powers of the former may be presumed to be much more ample than those of this court, as it combines in itself all the powers of a court of common law and equity. If both suits are to be allowed to go on at the same time, the defendant would inevitably be doubly vexed and harassed in respect of the same subject matter. Contradictory decisions, it is possible, may be given, and at last an appeal would lie in both instances to the same appellate jurisdiction. The plaintiff ought either to abandon his former proceedings, or be barred by the matter of this plea.

Mr. *Clarke* and Mr. *Morton* contra were stopped by the Court.

SIR L. PEELE C. J.—There is no precedent for a plea in bar in equity of the pendency of another suit for the same matter in another court, having the same course of practice and procedure, still less when the courts are established under wholly distinct systems of law. This defence is different from the case where the *decree* of another court of competent jurisdiction is pleaded in bar. A *decision*

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of a competent court of jurisdiction between the same parties, and relating to the same subject matter, ought not to be reopened, whatever the system of law on which the decision is based ; but the pendency of an undetermined suit is a different matter where there is a variance in the mode of procedure, (for instance, where one court can compel an answer upon oath of a defendant and the other has not that power,) and then such a plea as this ought not to operate as a bar. Looking at the nature of it, and the mode in which it would have to be determined by reference to the master, the mere question which the master would have to ascertain would be whether the dispute related to the same subject matter, and no more ; he could not enquire into the powers of the mofussil court or the course of practice there. The nature of the proceedings in those courts is somewhat assimilated to that of a court of conscience. The regulations direct that it should be so. In case of a reference, it is assumed that this court, directing the reference, is, of its own knowledge, acquainted with the laws and practice of the other court, but here the zillah court would not decide according to the practice of our courts of equity, but according to the regulations. It would be novel and unprecedented to decide that a person suing in a court of regulation for matter within the jurisdiction of the Supreme Court, should be barred by a plea of the pendency of the former proceedings. The inability to obtain the answer of the defendant upon oath in the zillah court is decisive, with reference to the rule laid down in Story, that if a plaintiff sue a defendant at law and in equity at the same time, and for the same cause, the latter cannot apply to put the former to his election until full answer and discovery ; but *after* putting in his answer on oath he may apply to put a plaintiff to election.

We have always treated the decisions of the mofussil

courts, with respect, and given to them the same effect and conclusiveness, as to the decrees of our own court. If the converse of the case existed, if the mofussil court had the power of sifting the conscience of a defendant upon oath, while the Supreme Court was wanting in that power, the former court would not act judiciously, in refusing to entertain a suit altogether, on the ground that a previous action for the same matter was pending here also.

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EXPARTE F. BIDDLE.

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MOTION on the petition of an attorney of the Supreme Court, praying that the petitioner might be appointed and admitted a notary public, to do and perform all customary notarial acts within the jurisdiction of the Court—viz: to note, and draw out protests on bills of exchange, to receive and attest marine protests, to authenticate all acts and documents made, done, and executed within the jurisdiction of the Court for the purposes of evidence in Foreign Courts and places, where the attestation of a notary public might be received as evidence thereof; together with all other powers and faculties appertaining to the office of notary public within the jurisdiction.

A certificate of two practising notaries public, of the Supreme Court, as to the fitness and qualifications of the petitioner were also annexed.

*Notary public—
authority of Sup.
Court to appoint.*

This Court has no power to appoint notaries public.

A notary public is not an officer of Court, within the meaning of the 24th Section of the charter, but is amenable to the jurisdiction of the Court of Faculties in England.

Mr. *Montriau* in support of the motion. This application is made, not on any particular side of the Court, but *generally*, the Court having power under the 10th section of the charter to appoint “so many and such clerks,

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and other ministerial officers, as shall be found necessary for the administration of justice, and the due execution of all the powers and authorities granted to the Supreme Court by letters patent." A proctor has all the powers on the ecclesiastical side, which a notary public possesses ; but the 24th clause of the charter, which empowers the Court to appoint them, applies to the ecclesiastical side only. In this Court, however, the functions of a notary public are exercised principally on the common law side, and for that reason this application is made under the 10th section, in order to procure more general powers. The Madras Court has been in the habit of admitting notaries, although their charter does not contain greater powers than those embodied in the charter of this Court, where practitioners, hitherto, have always applied to the Archbishop of Canterbury, who assumed a general jurisdiction in his Court of Faculties to appoint colonial notaries. This course, however, is open to serious objections : in the first place, the practice entails oppressive expence on the applicant ; and secondly, any person whatever, for whose fitness, capability, and character this Court has no guarantee, may and does obtain the appointment. The general power to appoint notaries public is in the Sovereign, and has been delegated to this Court for the full administration of justice under the charter.

Cur. adv. vult. (a)

(a) See judgment in next case.

EXPARTE A. ST. JOHN CARRUTHERS.

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THIS was a similar application on similar grounds.

Mr. *Dickens* in support of the motion. The whole question seems to reduce itself to the proposition, whether a notary public is an officer of the Court or not. It is submitted that he is. If so, then the Supreme Court would hold direct authority from the Crown, within its jurisdiction, and would be enabled to exercise this power, in the same manner as in the appointment of the ecclesiastical Registrar. The prerogative, no doubt, is in the Archbishop of Canterbury, and, has become law, notwithstanding the reformation, and resumption of power by Henry the 8th. Other colonial Courts have exercised this power, viz. the West India and Mauritius Courts.

*Notary public—
authority of Sup.
Court to appoint.*

This Court has no power to appoint notaries public.

A notary public is an officer of the Court of Faculties in England, to the jurisdiction of which, as such, he is amenable, and is not an officer of the Sup. Court within the terms of the 24th Section of the Charter.

Cur. adv. vult.

SIR L. PEEL. C. J.—If we could decide upon the ground of convenience we should be willing to comply with these applications, for we think it would be more convenient that notaries public should be appointed to act here by local authority than by one more remote. But we ought to be satisfied that we have the power to make the appointment, and not to suffer our judgment to be biassed by considerations of expediency. By the English law, the Crown is the ultimate source whence the appointment of notaries public proceeds, but it proceeds *immediately* from the Court of the Archbishop of Canterbury, viz. the Court of Faculties; and the Archbishop may be considered the depository of the prerogative right of the Crown. Accordingly it has been the practice of the Master of Faculties to appoint notaries public, as well for the Colonial possessions, and other distant dependencies of the Crown as for England itself. This Court has

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never exercised the power, and we consider this in itself an argument against the existence of any such power, since the reasons which prompted the present application would here at all times have been of equal force. The mere erection of a Court of Justice by the Crown does not of itself confer on that Court the power of appointing public notaries; even without words expressive of the power of appointing officers, the grantee of the franchise of the Court would have, as incident to the grant, the right to appoint necessary officers; but the duties of a notary public have no necessary connection with suits pending or about to be instituted in this Court, which possesses, under the charter, the jurisdiction of Courts of common law, equity, admiralty and of the ecclesiastical Courts, as well as the criminal jurisdiction of a Court of oyer and terminer, and which also has conferred on it, some of the visitatorial and corrective and appellate powers of the Court of Queen's Bench. But to none of these jurisdictions does it appertain, as an incident, to appoint notaries public. The power therefore, if it exist, must be derived from the Charter. In the 24th section there are enumerated, registrars, proctors, apparitors and *other officers*, but the last general term is limited by reference to the premises. The premises here mean the jurisdiction conferred by the charter, and under that section the power only is given of appointing officers to aid in the transaction of Court business. A sheriff is an officer of justice, the ministerial officer employed in the execution of process of the Court, but the appointment of that officer under the English law never belonged, as an incident to a Court of justice. A fortiori therefore, there is no reason to treat a notary public as included under the term "other officers." Not every person actually employed in a Court of justice, fills the character of an officer, or fills an office, in the legal sense of the term. There are several persons employed by a

Court, as interpreters, messengers, door keepers, and the like, who do not properly answer to the legal notion of an officer of the Court, though commonly so called. But a notary public has a far less immediate connection with a Court of justice, than any of these; he is a public officer: in one sense he is an officer of a Court, as the notaries now in Calcutta are the officers of the Court of Faculties, and to that, and not to our jurisdiction, would they be subject for misconduct in their character of notaries.

We have been pressed with the authority of the Supreme Court of Madras. We are disposed to treat its decisions with courtesy and respect, but we must decide on our own view, and the construction of our own charter. The practice here, too, has been at variance with that at Madras. It was stated that in the West Indies some of the local Courts make appointments of notaries public. But we have not been informed in what places particularly such practice prevails, and it must be remembered that in several, the English, is not the general established law. Neither is the English law the general law of the Mauritius. The Courts of a place, where the same law does not prevail as here, are no guides to us.

Applications refused.

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CAMRUTHERS.

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Monday.

Crown Side.

In the matter of the MAHARANEE OF LAHORE.

*Habeas corpus—
alien prisoner of
war.*

An alien prisoner of war cannot claim this writ as of right.

The English law relating to personal liberty extends, in the most, to British subjects only.

MOTION for a writ of habeas corpus to be directed to Major Macgregor, the Agent for the Governor General of India, resident at Benares, commanding him to bring up the body of Maharanee Jund Koonwar.

In the affidavit of Mr. Newmarch (the attorney of the Maharanee) the following facts were stated. The Maharanee Jund Koonwar was a native of Lahore a place situate in a foreign state and was the widow of the late Runjeet Singh, and mother of Maharajah Dhulleep Singh, the sovereign of Lahore. In September 1847 she was arrested by the order of the British Government, and subsequently (by the directions of the Lahore Durbar, but without the consent of the British resident at Lahore and against the strong remonstrances of Dulleep Singh) detained as prisoner in the fort of Shaikhoopore in the Lahore territories; she was for several months under a strict military guard, excluded from correspondence or interview with any one (except her attendants or slave-girls,) and under the surveillance of persons appointed for that purpose by the Lahore Durbar, until the period of her removal from Shaikhoopore to Benares, under a British escort, in the year 1848.

The Ranee about that time communicated with Mr. Newmarch, who thereupon entered into a correspondence with the secretary to the Government of India, with the object of obtaining a particular statement of and investigation into the alleged reasons for his client's detention. Having been unsuccessful in this respect, he solicited permission to visit, (accompanied by her native agent, Jebun Singh,) the Maharanee in person, at Benares, where she was then confined. This permission was accorded, with the restriction that Mr. Newmarch should not be

accompanied by Jebun Singh, and should hold his interview with the Ranee in the presence of the Governor General's agent. In October 1848, accordingly, Mr. Newmarch proceeded to Benares, and there called on Major Macgregor, who acknowledged that the Ranee was in his custody under certain instructions (which he refused to disclose) received from the Governor General; but he affirmed that he was ignorant of the charges upon which the Ranee had been placed in confinement: he (Major Macgregor) imagined, however, that she was detained on suspicion of being concerned in intrigues for the subversion of the Government of the Lahore state, the truth of which suspicions he believed to be the subject of an investigation then proceeding at Lahore: and further that the Ranee would be kept in confinement until such time as the Governor General in council should consider her political influence in the Lahore state had ceased.—Several interviews took place between Mr. Newmarch and the Ranee; on each of which occasions he found her kept a close prisoner under a guard of sipahees, and not allowed to quit the house in which she was confined, even under escort, for the purpose of taking air and exercise. By the advice and under the guidance of her attorney, she addressed the Governor General in a letter, soliciting information as to the nature of the suspicions entertained against her, and an investigation into their truth. It was stated in reply that the prisoner's conduct had been examined into by the Government of Lahore, and was found to have been such as to have rendered necessary the measures of punishment and precaution which had since been adopted; and that the Government of India saw no reason to renew, and declined to renew, investigations, which had already been completed and acted on.

It was further stated in his affidavit that Mr. Newmarch believed that his client (as she herself affirmed) had been confined without any statement having been made

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1848. *Crown Side.* to her of the charges preferred against her, and without any examination upon oath of the witnesses professing to support those charges. That by the regulations in force between the British Government and the Lahore state, it was stipulated, that there should be perpetual peace and amity between the British Government on the one part and Rajah Dhulleep Singh, the sovereign of the Lahore state, his heirs and successors, on the other part; and that the subjects of either the British or Lahore state, on visiting the territories of the other, should be on the footing of the subjects of the most favored nations. It was further stated, that the Ranee had, at Benares, expressed to her attorney the most friendly feelings towards the British Government, and the bitterest resentment toward the rebels then in arms against the Government established at Lahore. It was also alleged that the Lahore state was not at war with the British or any other Government, and that no declaration of war had been made (against the Lahore state by the British Government) since the treaty of the 9th March 1846; that the Lahore state was at that present time governed (under the provisions of a treaty concluded between the British Government and the Lahore Durbar on the 6th of December 1846,) by a Council of Regency in consultation with the British resident at Lahore; that a large portion of the people of the Lahore state were now in arms against that Government; but that the said Council of Regency, in consultation with the British Resident, still constituted the Government of the Lahore state, and actually managed the affairs thereof, and were acting in concert with the British troops for the suppression of the rebellion; and lastly, that the rebellion broke out several months after the first arrest of the Ranee, and while she was in close confinement at Shaikhoopore, and that the Ranee was in no way implicated in such rebellion.

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Mr. *Peterson*, appeared in support of the motion.

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SIR L. PEEL C. J.—This application was made before me in chambers, and the subject was then fully considered by my learned colleagues and myself. The argument of the learned counsel has not altered the opinion which we formed, when we thought the matter concluded, and we think it desirable to deliver our opinion at once.

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Great stress appears to be laid on the circumstance that the two states are on terms of amity. Undoubtedly the states are so, and allies; but there is no such union, no such indivisibility in the subjects of a state, as a body, as to render the question whether an individual subject of a state is an alien, friend or enemy—necessarily dependent in every case on the state of the relations between the heads of countries. The British Indian Government, as any other Government, may enter into treaties of alliance, and bind itself to support its ally against foreign attack or the rebellion of its own subjects. In the latter case, if a rebellion broke out, a *casus fœderis* would arise, which would make assistance obligatory, but the rebels against whom actual hostilities would be carried on would not be rebels to, but simply enemies of the ally, for to the ally, they would owe no allegiance. The law recognizes the separation of subjects of a foreign state, into alien friends and alien enemies, in other cases than that of the simple residence of a part of them peaceably in our own territories during war. The King may declare war against a state, excepting a portion of the subjects of that state. See *Wells v Williams*. 1 Ld Raym. 282. See also Foster's Crown Law, on the subject of an alien army adhering to our enemies, or a British subject assailing our allies. It was never customary to commence such limited hostilities by formal declaration of war, and there may be both in law and in fact actual hostilities

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without any declaration of war at all. Since then a portion of the Seikhs may be our friends, and another portion our enemies, in law as well as in fact; it is merely necessary to consider to which class this lady should be referred. It was argued that the Court cannot take judicial notice that we are at war. If this was so, still it is enough to observe that these affidavits sufficiently disclose actual hostilities. It appears further that the imprisonment of this lady commenced in her own state, on grounds of suspicion of adherence to the enemies of that state; the laws of that state, (if any law, beyond the will of the ruler have any respect paid to them,) are not known to us; but in time of actual or approaching hostilities the detention of a suspected person, when the safety of the state is deemed to be concerned, can scarcely be presumed to be an infringement of their laws. Into the acts of the Lahore state this Court has no jurisdiction whatever to inquire; whether the suspicions entertained were reasonable or not, it lies beyond our province to determine. Our inquiry must be limited to her actual status. Now it appears that she came not into this state as a visitor, either for pleasure or for business, or seeking the protection of its laws: she was brought by our government, with the concurrence of her own, a prisoner here after the commencement of hostilities, and is here detained without any intervening change of circumstances.

How can it with any reason be said of a person so entering these territories, that she comes hither as an alien friend? She owes, under the circumstances of such a forced detention, not even a temporary allegiance to this state. It is not necessary that the subject even of a foreign state at war with us, should visit us under a safe conduct, or a license, to be regarded as an alien friend; but nothing can be predicated of this lady's status at present with truth, but that she is a state prisoner, detained by the authority of the Governor General,

and though not taken in arms, her status, under the circumstance of her detention, appears to us not different from that of a prisoner of war. Even in the character of a mere state prisoner enough is not shown to lead to an inference that her imprisonment is illegal. She is not resident where the English law is the general law as regards personal liberty. The English law as to personal liberty does prevail in Calcutta as to all its inhabitants. Beyond the local limits of Calcutta, the English law on this subject is the personal law of a class, viz. British subjects, which they carry with them. The common law of England, which gives the right to this writ, has been introduced in Calcutta with the general body of the English law. Nothing but an act of the legislature could here in Calcutta suspend its operation; but the power of the Governor General to hold in the Mofussil prisoners of state in confinement, and detain them there without a charge on suspicion alone, appears from the Regulation 3 of 1818.

The mere fact then of a detention by the order of the Governor General of such a person in the Mofussil as a state prisoner, without charges made, or evidence of guilt communicated, does not, as it would here, establish or raise a presumption of a case of imprisonment contrary to law; and the fact that the detention is by a British subject does not advance the right to this remedy, since the subjection of the keeper to the general jurisdiction of this Court does not give any additional claim to freedom to the detained person, which he would want in the custody of one not so subject; the question depending so far as regards the detained, on his status, or on the illegality of the imprisonment, and not on the accident of the status of the keeper. The conduct of the Governor General in so dealing with state prisoners is exempt from the jurisdiction of this Court, as well as of the Courts of the Honorable the East India Company. For an oppres-

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sive use of this power, which is not to be supposed probable, the remedy would be by application to a higher, though distant, authority. It appears to us that this lady who is not a subject, who owes not even a temporary allegiance, who is brought into this country a prisoner of state during actual hostilities, and so remains, hostilities still raging, can claim no right to this high prerogative writ, grantable as of right to a subject for the vindication of that liberty which the English law gives to all resident where it prevails.

Application refused.

A P P E N D I X .

APPEALED CASES.

(1) RAMLALL THAKOORSYDASS and others.

v.

SOOJAMULL DHONDMULL and another.

This case was appealed by the plaintiffs from the Supreme Court of Judicature at Bombay to the Privy Council, and the judgment of the Court below, holding such wager illegal, was reversed.

The following is a copy of the marginal note to the case, as reported, in *Moore's* cases in the P. C; on appeal from the East Indies, 339.

"By the common Law of England in force in India, an action may be maintained on a wager, although the parties had no previous interest in the subject matter on which it is laid, if such wager be not against the interest or feelings of third persons, does not lead to indecent evidence, and is not contrary to public policy. The mere circumstance, that a wager concerns the public revenue, or creates a temptation to do a wrong, will not render it illegal.

"A wager on the average price which opium should fetch at the next Government sale at Calcutta, the plaintiffs having to pay the defendants the difference between such price and a sum named, per chest, and the defendants having to pay the difference between such price and the sum so named, if the price should be above that sum, is not an illegal wager, or contrary to public policy, though the proceeds of the opium sale at Calcutta formed part of the Government revenue.

"The Stat. 8 & 9 Vict. ch. 109, amending the law relating to games and wagers does not extend to India."

Note.—Act XXI. of 1848, sect. 1. avoids all wagers.

(2) *MCLEOD v. THE BANK OF BENGAL.*(3) *FAGAN v. THE BANK OF BENGAL.*

Both these cases were appealed to the Privy Council, and in both the decisions of the Court below were reversed. For reports at length see 13 Jurist, 945, 14 Law Times, 285, whence the following judgment delivered by Lord Brougham (19th July 1849) is extracted.

LORD BROUGHAM.—Both the cases involve the same question, and depend mainly on its decision. If it be determined in the appellants' favour in the first appeal, they are both decided for them. If that question be decided against them, special circumstances peculiar to the second case require to be considered. That question relates to the authority which the house of Macleod and Co. agents of Mr. James William Macleod in the one case, and of Capt. Fagan in the other, had to indorse the paper belonging to these principals, and deposited with them as agents, and the authority, is the same in both cases, for although a correspondence peculiar to the second is relied upon as qualifying or limiting the authority it does not appear to us to possess that virtue, even supposing it would be imported into the consideration of the case, and allowed to influence the construction of the power of attorney on which the authority of the agents rests. It is admitted on all hands that if Macleod and Co. having the bills in their possession, had no power to indorse them, their act of indorsement could convey no title to the party taking and discounting them, any more than a forgery would do. It is equally admitted, on the other hand, that if they had authority to indorse the bills their indorsement passed the property. It may be taken as also admitted that whatever may have been the law established for a time in *Gill v. Cubitt*, 3. B & C. 466, and *Down v. Halling*, 4 B. & C. 335, and one or two other cases, and not abandoned, at least as far as the language went which the Court used in some subsequent cases, such is now law no longer, and that the negligence of the party taking a negotiable instrument does not fix him with the defective title of the party passing it to him. Thus the main and fundamental question is, had Macleod and Co. authority to indorse under the power of attorney, which is in the same words in both cases? The authority is to sell, indorse, and assign, or to receive payment of the principal according to the course of the treasury, and to receive the consideration-money and give a receipt for the same. It is contended for the respondent that the words "sell, indorse, and assign" used conjunctively cannot be used in the disjunctive, but that the only power given was

a power to indorse as one ancillary to sell, and that we are to read it as if it were a power to sell, and for the purpose of selling to indorse. This construction is endeavoured to be supported by referring to the variation of "or" for "and," immediately following "or to receive the money at the treasury." We are unable to go along with this view of the instrument; the variation is clearly owing to a new subject-matter being introduced. The matter first dealt with is the use of the paper as a continuing and subsisting instrument—as securities not paid off. The matter afterwards dealt with is the receiving of the money due on these securities when paid off; and when they ceased to exist it is called "payment of the principal," and there follows a like power to receive the consideration money, and give receipts, that is, to secure the money and give receipts for the money arising from the sale, indorsements, and assignment, because, to that alone could this cause apply, the giving up the paper to the treasury authorised by the second clause requiring no receipt whatever. The change of "and" for "or," in the second clause, does not, therefore, appear at all to alter or affect the construction of the first clause or member of the sentence. Shall we, then, say that a power to sell, indorse, and assign does not mean a power to sell, a power to indorse, and a power to assign? And would not such a negative or exclusion be doing violence to the plain sense of the words? If we adopt this exclusive construction, we must hold that these words not only give no power to indorse without selling, but also that they give no power to assign without indorsing, and we must suppose the agent acting under such a power to be entirely crippled. Now, as there can be no doubt that this is a general form for powers of attorney to deal with negotiable instruments, and that in the general case, whatever may have been the understanding in the case at the bar, the power to indorse is intended to be conveyed, were we to adopt the respondents' construction, we should sanction this proposition not only that all powers now existing and acted on, and which have been acted on, if conceived in this form are most defective, indeed almost inoperative, and that what has been done under them, and is now doing under them, is insufficient to convey a title to the taker of the negotiable instrument, but that in future to make such powers complete, indeed, to render them useful, a new and very tautologous phraseology must be adopted, such as thus,—
 "Power to sell, and also indorse, and also assign, or to indorse without selling, or to assign without selling or indorsing, or to sell without indorsing," and so forth. It appears to us that the rational and the natural construction is the one which represents a power to sell,

indorse, and assign, as a power to sell, a power to indorse, and a power to assign, so that these acts may be done apart or together, and that the powers are conveyed conjunctly and severally. The elliptical mode of expression, by not repeating the words "a power" or "full power," we consider to be thus properly supplied, and the expression thus justly expounded to be the ordinary mode of parlance. But it is said that the power was given to do the act in question on the donor's behalf; this is really only saying that what the agent is to do, he is to do as representing the principal—as doing it on behalf of, or in place, or in the right of the principal. But it is further said that, even if the expression be read as only amounting to this, the indorsement is to be made for the benefit of the principal, and not for the purposes of the agent. We do not see how this very materially affects the case; for it only refers to the use to be made of funds obtained from indorsement, not to the power. It relates to the purpose of the execution, not to the limits of the power itself; and though the indorsee's title must depend upon the authority of the indorser, it cannot be made to depend upon the purpose for which he acts under the power. We find great reason to commend the ability, and learning, and diligence shown in the judgment delivered below, but it would have been more satisfactory to have found that the argument, as urged before us in support of the judgment, had been considered by that Court; on the contrary, we cannot find any reference to the terms of the power either in the judgment or in the reasons given in the petition of appeal. The Court seems to have assumed that there was no authority to indorse; indeed, the printed cases before us do not themselves seem to take the point or to raise the question: and yet the respondent here distinctly admits that the judgment cannot stand if there was the power to indorse generally. I have seen (since the argument) the printed forms used at the India House of powers of attorney: they are all in the words here used, "indorse, sell, and assign;" and the title in red ink printed at the top of the page, shows the meaning affixed in practice to those words. It is "power to sell or indorse." Much reliance was placed by the respondents on the case of *De Bouchot v. Goldsmid*, but the question there was, whether shares could be pledged by an agent acting under power to sell, assign, and transfer, and the undisputed law as to his being unable, under an authority for selling, to pledge goods of his principal, was held applicable to shares as well as goods. The question here arises on a negotiable instrument; and it was by no means decided in the case referred to, that a power to sell, indorse, and assign, is confined

to selling, without extending to indorsing. The frame of the two powers upon the construction of which the whole question here turns, is entirely different in the two cases. In the case in 5 Vesey, there are only the words, "sell, assign, and transfer," and no word of pledging or referring to deposit at all. In 1834, I examined fully all the cases within the principle of *De Bouchot v. Goldsmid*, in the case of *Wilson v. Moore*, 1 My. & K. 337, approximating to the former case; and I am informed that this decision of *Wilson, v. Moore*, has since been constantly cited in ruling the question. But I must remark, that in the judgment there given, I referred to the law now exploded; and I cited the cases of *Gill v. Cubitt*, and *Down v. Halling*, as having gone far to overrule *Lawson v. Weston*, a decision of Lord Kenyon's, in 4 Esp. 56. Those cases are no longer law: and Lord Kenyon's opinion is set up and supported by all lawyers. As we are with the appellants on this fundamental point in both cases, it becomes unnecessary to say any thing of the peculiar circumstances which distinguish the second case from the first. The judgment, therefore, in both cases must be reversed. The judgment, in both appeals being reversed, the defendants ought to be placed in the same situation as if there had been a verdict for them in the first instance. We say nothing as to costs here.

Verdict entered for the defendants
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(1) *Bill of exchange—form of signature by agent.*

S. C. & Co. draw and endorse a bill of exchange, adding to their signature the words "agent," and in the margin

of the bill the words "Santipore Sugar Concern." *Held*, that S. C. & Co. were personally responsible. *Malcolm and others v. Smith and another*, 283

(2) *Union bank post bill—form of signature—authority to issue—rights of bonâ fide holders.*

Assumpsit on post bills in the following form. "Debit U. B. post bill account, U. B. post bill, Co.'s Rs. 10,000. At 60 days' sight &c. we promise to pay on account of the proprietors of the U. B. to the order of Messrs. C. L. & Co. Rs. 10,000, J. R.—W. P. G. Directors." The above was addressed to the Secretary and countersigned by the Deputy Secretary.

Held, in form—the note of the Union Bank, and not of the parties signing.

The partnership deed of the U. B. limited its paper circulation; the deed however, had been constantly violated in this respect. *Held*, that, as issuing post bills came within the scope of the ordinary business of the Bank, a bonâ fide holder for value of U. B. post bills without notice, (even in the absence of evidence of usage) was bound only to consider the apparent authority of the Bank to issue them, and was not affected by excesses of authority arising out of violations of the partnership deed. *Brad-don and others v. Abbott, Secy. &c.* 342

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- (2) *Warrant of commitment by magistrate for contempt—indefinite period of imprisonment—informality of.*

A warrant of commitment contained a direction to the Sheriff to detain one W. A. (for contumacy and contemptuous conduct in the presence of the magistrate) until the 7th day of May next, at which time he was to be brought up again before the justices—*Held*, that the warrant was informal, the imprisonment being for an indefinite period, and in excess of the magistrate's authority.

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Plaintiffs were endorsees of Union Bank post bills from one Hastie, a purchaser for value, and a shareholder of the Bank.—*Held*, that Hastie being himself a shareholder could not sue the Bank, and that plaintiffs, being identified with him, were in consimili casu.

Nothing short of general ratification can prevail against a Bank sued in law in the name of the nominal defendant, when the right to sue is based on ratification by the Bank. *Allan v. Russell*, 389

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- (5) *Partnership deed—construction of.*

Power of removal.

By the 7th clause of a partnership deed it was provided "that the partnership should continue for five years two months and seven days, during which term no partner should retire without the consent of his co-partners, but that the senior partner should have the power of making any new arrangements annually which he might deem requisite for the interest of the new partnership, and its constituents, either in regard to the retirement or admission of partners, or the extent of their shares." The 22d clause provided, "that in case of the retirement or removal of any of the partners during the co-

partnership term, his interest in the concern and profits should continue six months, to be calculated from the date of such retirement or removal." The 23d clause also contained provisions "in case of the interest of any partner ceasing or determining, by reason of death, retirement, or removal under any preceding article."

Held—that neither in the 7th clause alone, nor within the four corners of the deed, was any power conferred on the senior partner to remove a co-partner, or dissolve the partnership until the expiration of the time limited by the deed.

Held also—that if such power was to be implied, it should be by necessary implication. *Russell v. Ashburner*, and *Ashburner v. Russell*, 114

- (6) *Infant partner—power of to contract and sue.*

A child of the tender age of three years cannot be constituted, nor considered to be, nor can he hold himself out as, a partner in a trading firm, so as to be enabled to sue in respect of contracts entered into with the firm, nor can the adult members join him as a party suing on record. *Petumdoss and another v. Ramdhone Doss and others*, 279

- (7) *Union Bank partnership deed—pramble of.*

See DEED.

PAYMENT.

See AMENDMENT at nisi prius. PLEADING, II. 6.

PRACTICE at common law, 3.

PENALTY.

See CHARTER-PARTY.

LIQUIDATED DAMAGES.

PILOTAGE.

What services beyond—remuneration for.

A pilot and his men, (who had been signaled on board a vessel for the purpose of piloting her up to Calcutta), finding nearly the whole of the crew of the latter disabled from scurvy, assisted also, with

the knowledge and assent of the Captain, in navigating the vessel, kept watch at night, and worked as seamen.—*Held* that the pilot and his men were entitled to remuneration, beyond that for mere pilotage. *In re Barque Athole*, 199

PLEA.

See JURISDICTION, 1.

LIS PENDENS.

PLEADING in equity, II. 1, 2.

PLEADING at common law, II. 1, 2, 3, 4, 5.

PLEADING.

AT COMMON LAW.

I. PLAINT.

- (1) *Malicious arrest—averment of malicious intent—sufficiency of.*

The plaintiff (after setting out the practice of the Court as to the time allowed on writs of Capias for perfecting special bail), alleged that the defendant sued out a writ of Capias against defendant requiring him to put in bail within 8 days after execution on him of the writ—It then averred—"that such writ was intended by the Court to have been executed, and ought to have been executed, within Calcutta, or 10 miles thereof. Yet that defendant wrongfully, maliciously, and unjustly contriving and intending to imprison, harass, and oppress plaintiff, and to cause and procure him to be arrested and imprisoned at a great distance, to wit 1,500 miles from Calcutta, viz. at Moulmein, and to prevent plaintiff from having time to put in bail, and to deprive him of the opportunity and power of putting in bail within the period limited; afterwards to wit &c. wrongfully and maliciously delivered the writ to the sheriff for the purpose of being executed at Moulmein and arrested him thereunder at Moulmein."—*Demurrer* on the ground (among others) that the plaintiff contained no averment that when the writ was delivered to the sheriff, defendant was not actually resident in Calcutta or within 10 miles thereof; or that the writ could not have been executed within those limits—that therefore the allegation of delivery of the writ to the sheriff for a

wrongful and malicious purpose was but inferentially alleged—*Held*, that the malicious intent and circumstances showing it were sufficiently averred. *Framjee Ruttonjee v. Nusseerwanjee Ruttonjee*, 100

- (2) *Allowance of counts, Reg. Gen. H. T. 4. W. 4. r. 6.*

A plaintiff on Union Bank Post Bills contained counts, describing the instruments in one set as bills of Exchange, and in another as promissory notes.—*Held* that these counts were not in apparent violation of the pleading rule 6. of H. T. 4. W. 4. and ought to be allowed. *Braddon v. Abbott*, 330

- (3) *What sufficient averment of bailment to master of ship.*

The plaintiff stated that "defendant being master of a ship, had the care of a certain chattel for safe conveyance therein."—*Held*, on demurrer, a sufficient averment from which the defendant's duty, as a common carrier, might be inferred. *Browne v. Brown*, 333

II. PLEA.

- (1) *Justification by sheriff under Act xxiii. of 1840. Mofussil process.*

Trespass against the sheriff for breaking and entering three closes of the plaintiff and seizing and sealing three godowns situate thereon. *3d Plea*—After stating that a writ had been issued by the Judge of Zillah Backergunge, directed to the Nazir of that Zillah commanding him to distrain certain lands goods and chattels as per accompanying list "A pukka built dwelling-house including out-offices and golahs or godowns, containing rice about 59,000 maunds, situated in Sootah Looty Hantcollah, belonging to Mirtonjoy Saha and others," in satisfaction of a decree against them by the Court of Sudder Dewanny Adawlut; proceeded to justify thereunder, stating that the above writ, being duly delivered into the office of the defendant as sheriff, and duly endorsed under the hand and signature of a Judge of this Court (according to the provisions of Act xxiii. of 1840) the defendant was directed to execute the same as such sheriff (which he did) within the limits of Calcutta and thereby committed the trespasses complained of. *Demurrer*

in substance, that the plea disclosed no defence to the action, and that it contained an argumentative denial of plaintiff's property. *Held*, on both points—that the plea was good. *Radamath Saha v. A. F. Smith, sheriff.*—*Gopeenath Saha v. Same*, 127

(2) *Accord and satisfaction, averment of value.*

To an action brought by the representatives of one R. N. against the executors of one D. T. upon a contract by the latter to indemnify R. N. on default in payment of a debt due by A. B. and C. to R. N. the defendants pleaded, that before breach A. B. and C. at the request of R. N. made their indenture, and sealed and delivered the same, as their act and deed, to R. N. which indenture R. N. accepted in full satisfaction and discharge of the promise of D. T.

Held bad—on the ground, that the nature of the indenture should have been described, or it should have been stated to be of some value, or that some consideration passed. *Rajindrochunder Neogy v. D. M. Gordon*, 144

(3) *Accommodation note.*

Assumpsit by the third indorsee of a promissory note.

2d Plea: that the note was made for the accommodation of the first indorsee, and without consideration for the making, or payment thereof; or for the endorsement thereof by 1st to 2nd indorsee: that the note remained, (without authority from the drawer to negotiate it) outstanding in the hands of the second indorsee, who after due date endorsed to the plaintiff—*Held bad*.

3rd Plea—That the note was an accommodation note, and given without consideration, and subject to an agreement to the effect—that certain unadjusted accounts between the original parties to the note should be adjusted prior to its reaching maturity: that if the balance proved in favor of the drawer, the note should not be enforced against him by any one: that the balance did turn in his favor; but the note was endorsed fraudulently to the plaintiff after due date—*Held good*. *Nursingchunder Bose v. Panchcowrie Day Chowdry*, 193

(4) *Judgment recovered—Court of Requests—jurisdiction of—proclamations passed under 39 and 40 Geo. 3 c. 79—construction of.*

Counts on promissory notes.

2nd plea. As to Co.'s Rs. 426 parcel, &c.—a decree for defendant in Court of Requests for same cause of action to that extent.

3rd plea—as to residue beyond Co.'s Rs. 426 parcel &c. that plaintiff impleaded defendant in Court of Requests for the latter amount, and at the same time released the residue in accordance with the above proclamations and statute, and the practice of that Court.—*Held* on demurrer, that the 2nd plea contained a good and conclusive defence, and was rightly pleaded by way of estoppel.—*Held also* that the 3rd plea was bad, inasmuch as the last proclamation conferred no power to release the surplus, in the event of a claim exceeding Sa. Rs. 400, so as to enable a plaintiff to bring his case within the jurisdiction of the Court of Requests. *Aga Abdool Hossain v. Peepee Jaun*, 248

(5) *Policy of insurance—When fraud must be pleaded to prevent recovery back of premium by insured.*

Fraud must be specially pleaded to a count to recover back the premium paid for a policy of insurance. *Methold v. Massey*, 385

III. REPLICATION.

(1) *Replication de injuria and new assignment, when double.*

Trespass for assault and battery. 2nd plea justified the whole of the trespasses alleged, on the ground that defendant was possessed of a close wherein the plaintiff was unlawfully making a noise and disturbance. 3rd plea justified in defence of servants of the defendant, on whom plaintiff had made violent assault. *Replication*—De injuria and new assignment of excess.

Held bad for duplicity; and that plaintiff was confined to trespasses on one occasion. *Griffiths v. Spence*, 84

(2) *Detinue pledge of chattels, with power of sale, when redeemable.*

To detinue for cow hides, defendant

pleaded in substance;—"That the goods were deposited with him on account of a loan to plaintiff repayable on demand under an agreement empowering defendant, in case of default in repayment, to sell at the Bazaar price, and to charge commission, and retain the same, as well as the principal, out of the proceeds of the sale." The plea then averred, that, after demand of the sum due and refusal to pay, defendant contracted to sell at the Bazaar price.—*Replication* "That after demand of payment and default, and before defendant entered into any binding agreement to sell, plaintiff tendered a large sum to wit Rs. 1,500 in full satisfaction of the sum due, and then requested defendant to re-deliver the cow hides, which defendant refused.—*Demurrer*, in substance.—That the replication did not show, that the authority to sell was revocable after demand of payment and default thereon; or after defendant had entered into contracts to sell; or that the authority was revocable at all, without the consent of defendant. *And also*; that the statement as to tender "of a sum to wit Rs. 1,500 in full satisfaction of the sum due," was informal.

Held—as to both objections, well pleaded. *Moonshree Abdool Hulleim v. Bowany-churn Sein*, 93

(3) *Effect of issuing ca. sa. in detinue.*

A ca. sa. in an action of detinue for charters, operates as an extinguishment of the right to them. *Hasleby v. Owen*, 378

IV. REJOINDER.

(1) *Authority of sheriff to order release.*

Trespass for false imprisonment against sheriff's bailiff. Plea:—justification under the warrant.—*Replication*—as to portion of imprisonment, that the sheriff *duly* under his hand directed defendant to release plaintiff; but defendant neglected to do so. *Rejoinder*.—That the debt and costs were unpaid, and the sheriff without the license of the execution creditor wrongfully directed a release.

Held good—On demurrer assigning as cause, that the bailiff could not dispute the sheriff's authority or orders.

Held also.—That the word *duly* did not sufficiently show that the sheriff

acted under proper authority. *Beharri-ram v. Alexander Lyon*, 177

PLEADING.

IN EQUITY.

I. BILL.

(1) *Curators' Act (No. xix. of 1841) construction of—parties.*

B. D. (a creditor of one L. M. deceased) filed a simple creditor's bill (after having, on his own application, procured the appointment of the Ecclesiastical Registrar as curator of the property of L. M.) against one A. Sein and the representatives of L. M. making the curator a party defendant, and alleging generally that through the connivance and collusion of A. Sein and the representatives of L. M. the curator was unable to ascertain who had obtained possession of the property of L. M. since his death.—*Held*, that the suit was defective, inasmuch as the curator represented the estate of the deceased, and ought to have been the party complainant in the absence of any express allegation, or proof of fraud, or collusion or insolvency on his part. *Bhogoban Doss v. A. Sein and others*, 154

(2) *Partnership—joint stock company—parties.*

A bill was filed by a partner in an Insurance Company, to recover sums insured on two policies, against the secretary and others members. It was alleged, that the secretary and some "two or more" of the other defendants had acted and signed the policies as committee men or directors, on behalf of themselves and the other members:—that the shares amounted to 100; and were transferable:—and that without great inconvenience, all the members could not be made parties.—The bill prayed an account and relief against the whole Company.

Held, on demurrer—that in order to bind the Company, some person, representing shareholders not interested, as signing directors should have been before the Court. *Stowell v. Holmes & others*, 259

(3) *Bill and cross-bill pleading—contract in fieri—illegality and revocation of—Bill to enforce an agreement—cross bill,*

praying that the agreement might be cancelled, as having been fraudulently obtained; and, also, that certain half-notes, deposited as security in respect thereof, might for the like reason be delivered up.—*Held* on demurrer, that the subject matter of the bill and cross bill was identical, as the portion of the prayer referring to the restoration of the half-notes might be rejected as surplusage:—that although the contract appeared to be illegal, still as it was in fieri it might be recalled and a party be relieved against it, and the half-notes be recoverable at law. *Bamundoss Mookerjee v. Oomeschunder Roy*, 264

II. PLEA.

JURISDICTION.

(1) *Constructive inhabitancy.*

One Khistnochunder, in his life time, possessed a dwelling house in Calcutta, where he occasionally resided with his family. After his death the defendant, Rajcoomaree, his younger widow, became entitled to a share in that family dwelling house, but never did during her widowhood actually reside there.—*Held*, upon plea to the jurisdiction,—that she was subject constructively to the jurisdiction. *S. M. Bamasoondery Dossee v. S. M. Rajcoomaree Dossee*, 70

(2) *Constructive inhabitancy.*

The Defendant jointly with his two brothers, inherited a house in Calcutta, wherein the latter usually resided; but the Defendant only came down occasionally to reside there.

Held upon plea to the jurisdiction,—that he was constructively subject to the jurisdiction. *Mudoosoodun Pyne v. Hurrydoss Mullick*, 74

(3) *Plea in bar. Difference between procedure of Mofussil and Sup. Court—Lis pendens.*

The pendency of another suit in the Mofussil between the same parties, in respect of the same subject matter, is not pleadable in bar, to a suit on the equity side of this Court, the system and practice of procedure in the two Courts being different. *Muttyloll Seal v. Joygopaul Chatterjee*. 418

POST BILLS.

See BILLS AND NOTES.

JOINT STOCK COMPANY.

PLEADING at common law, II. 3.

UNION BANK.

POWER OF ATTORNEY.

(1) *Construction of—principal and agent—extent of authority.*

The plaintiff, by power of attorney, appointed A. D. M. and C. F. carrying on business under the Firm of M. J. and Co. to be his true and lawful attorneys and attorney jointly and severally, in their individual names, or in the name of the said firm, &c., on his behalf to *sell, endorse, and assign*, or to receive payment according to the course of the Treasury, of all or any of the securities of the East India Company, &c. to which he then was, or might lawfully be entitled, &c. *Held*—that no authority empowering to *pledge* the securities in question, was thereby conferred on the agents.

Held also—that the agents could not become purchasers or transferees of the above securities; as they would then by their own act, create in themselves an interest, at variance with their duty, as vendors for, and agents of, the principal. *J. W. Macleod v. Bank of Bengal*, 28

(2) *Power of Attorney—construction of—principal and agent—recognition of acts.*

M. F. and Co. were agents of plaintiff who (being indebted to them) transmitted, at their request, a power of attorney authorizing them to *sell, endorse, and assign* certain Company's paper of plaintiff, in their hands. On receipt of the power M. F. and Co. first sold to themselves, and then pledged the securities with the Bank. Shortly afterwards, M. F. and Co. failed: their schedule showed a balance in favor of plaintiff, who, without objection to the acts of M. F. and Co. received two dividends as a creditor, upon the amount.

Held, first, that, as the evidence did not show a sale *in fact* by M. F. and Co. to themselves, such alleged sale must be treated as imaginary and that M. F. and Co. when they pledged to the Bank, were

acting under the power, which gave no authority to *pledge*; secondly that as there was no proof of the plaintiff's knowledge of the real state of circumstances attending the alleged sale, there was no recognition on his part of the acts of M. F. & Co. *Held*, also that interest under the circumstances in the nature of damages under Act XVI. of 1841 could not be allowed. *Fagan v. Bank of Bengal*, 269

PRACTICE AT COMMON LAW.

- (1) *Capias ad resp.*—arrest bail rules 3 and 6.—*Sheriff's duty*.

A writ of *cap. ad resp.* requiring a defendant to put in special bail within eight days, must be executed within Calcutta or 10 miles thereof.

If a defendant at the time of issuing the writ be within those limits, and subsequently depart thereout, so that he cannot be arrested, the sheriff must apply for further instructions. *Nusseerwonjee Ruttonjee v. Tarronjee Ruttonjee*, 67

- (2) *Judgment against casual ejector*—costs.—*Landlord and tenant*.

In this form of action the Court will usually (even after considerable delay) let in a party to take defence, unless gross laches are shown.

One L. believing his landlord's title defective, purchased the lands whereof he was tenant, before the expiration of his lease, from another party, in whom he alleged the real title to exist; taking the conveyance and bringing ejectment in the name of the lessor of the plaintiff. Judgment being subsequently signed by default; the present motion was made by the landlord for leave to enter into the common rule, and as such to defend his title.

Held, under the circumstances that (contrary to the ordinary rule) the judgment must be set aside *without costs*. *D. d. Bissonath Day v. E. Hilder*, 189

- (3) *Pleading*—payment—amendment *at nisi prius*.

When the evidence shows a larger payment than the sum actually pleaded—the plea cannot (under plea rule, 9.)

be amended by inserting the larger amount. But a new trial will be granted on terms. *Bhobosoonderee Dabee v. Thakoordass Mookopadhiah*, 402

PRACTICE IN EQUITY.

- (1) *Irregularity*—construction of 28th new equity rule of 1842.

Under this rule it is complainant's duty to set the plea down for argument within the time limited thereby, otherwise its validity in point of law is admitted; and *semble*, if he do not either set the plea down or reply thereto, within such limited time, he admits its validity in point of fact as well as law. *Beharriram v. Sewemberram & another*, 80

- (2) *Mortgage*—foreclosure—account by Registrar—irregularity of decree absolute without accounting for intermediate receipt of rents and profits.

A mortgagee, (having previously entered into receipt of the rents and profits of the mortgaged premises) took the usual account of debt and interest by the Registrar, who appointed that day six months for payment thereof. The defendant having made default, the decree for foreclosure was made absolute.

Held, that such decree was erroneous, and that there should have been a reference to the Master to take an account of the rents and profits received by the mortgagee. *Mutty Loll Seal v. Joggopaul Chatterjee*, 105

- (3) *Injunction to stay trial at law until answer to discovery*.

In the case made by this motion, the injunction goes until answer, and cannot be opposed by affidavit. *Rajindro Mullick v. Ramgopaul Chund*, 111

- (4) 28th equity rule—amendment of bill after plea allowed.

After plea allowed, the complainant will not be allowed to amend his bill, without stating fully the proposed amendments in his notice of motion. *Beharryram v. Sewemberram & another*, 112

- (5) *Injunction when too large*,

A mortgagee of 3-5ths of a joint and

undivided talook, filed a bill for foreclosure. Shortly afterwards the whole estate was suffered to be sold for arrears of government revenue. The mortgagee then filed a supplemental bill, praying for an injunction (absolute in the first instance on the ground of waste) to restrain the mortgagee (the registered proprietor) from receiving *any part* of the *entire* produce of the sale of the whole estate.

Held—that the injunction was too extensive, and ought to have been limited to 3-5ths of the money, as representing 3-5ths of the estate viz. the premises mortgaged. *Mutty Loll Seal v. Joygpaul Chatterjee*, 172

(6) *Mode of compelling payment of taxed costs upon change of Attorney.*

Upon demand and refusal to pay taxed costs, an order for payment will be granted, upon affidavit of the demand and refusal, and service of notice of motion; upon service of that order and further demand and refusal, an order for attachment will be granted, without notice, upon production to the registrar of an affidavit of service of the last mentioned order, and of the further demand and refusal. *Mutty Loll Seal v. Bycauntnath Mullick*, 188

(7) *Sequestration, writ of—real estate cannot be sold under.*

Motion that the sheriff be directed to sell certain sequestered property consisting of houses, and pay proceeds in satisfaction of certain costs awarded against the owner. *Held*, in accordance with the practice in England, that real estate could not be sold under writ of sequestration. *Fabian v. Walter*, 275

(8) *Costs of suit in Sup. Court—when mortgagee entitled to, out of an insolvent's estate.*

A mortgagor, (after mortgaging certain property a second time) became insolvent: an order was issued from the insolvent Court, requiring the second mortgagee to come in, and prove his claim:—This he declined or neglected to do, but subsequently instituted a suit in this Court.—*Held*, that under the circumstances, the 2nd mortgagee was not entitled to his costs of suit out of

the insolvent's estate. *Llewellyn v. O'Dowda, assignee &c.* 169

PRINCIPAL AND AGENT.

See POWER OF ATTORNEY, 1, 2.

PRISONER OF WAR (*Alien*).

See HABEAS CORPUS, 3.

PRIVY COUNCIL.

See APPEALED CASES, 1, 2, 3.

PROCLAMATION.

Under 39 and 40th Geo. III. c. 79.

See PLEADING at common law, II. 4.

RATIFICATION.

By shareholders of a joint stock Company.

See JOINT STOCK COMPANY.

By principal, of agent's acts.

See POWER OF ATTORNEY, 2.

REQUESTS, COURT OF.

See JURISDICTION, 3.

PLEADING at common law, II. 4.

REVENUE.

Of E. I. Company—whether affected by wager on the future price of opium at the public sales.

See APPENDIX, 1.

ILLEGALITY.

WAGER, 1, 2, 3.

SEQUESTRATION.

Realty cannot be seized under.

See PRACTICE in equity, 7.

WRIT, 4.

SEVERAL COUNTS.

*Allowance of.**See* PLEADING at common law, I. 2.

SHARE.

*Having share in family dwelling house subjects to the jurisdiction of the Sup. Court, without actual residence.**See* INHABITANCY.

JURISDICTION, 1, 2.

PLEADING in equity, II. 1, 2.

SHAREHOLDER.

See JOINT STOCK COMPANY, 2.

PARTNER, 2, 7.

PLEADING in equity, I. 2.

SHERIFF.

- (1) *Delivery of ca: sa: to sheriff with malicious intent.*

See PLEADING at common law, I. 1.

- (2) *Justification under Mofussil writ endorsed by judge of Sup. Court.*

See PLEADING at common law, II. 1.

- (3) *Authority of sheriff to order release.*

See PLEADING at common law, IV. 1.

- (4) *Notice to sheriff, (after seizure,) of change of title and entry, when necessary.*

Certain lands, (secured by a postnuptial settlement in trust to the sole use of the wife,) were seized by the sheriff for a debt of the husband. Subsequent to the seizure, a change of trustees was effected. The new trustee forthwith entered on the lands, in order to retake possession, and upon the sheriff holding over, brought his action. *Held*, that, (assuming an action would lie against the sheriff, for so continuing in possession, after notice of such devolution of title and entry:) still notice thereof ought in the first instance to have been given to him. *Smith v. Mackilligan*, 165

SIGNATURE.

- (1) *By Agent.*

See BILLS AND NOTES, 1.

- (2) *By Director of Company.*

See BILLS AND NOTES, 2.

JOINT STOCK COMPANY.

UNION BANK.

- (3) *By partner.*

See CHARTER-PARTY.

SPECIFIC PERFORMANCE.

See PARTNER, 5.

TRESPASS.

See ARREST.

PLEADING at common law, II. 1.

Justice of Peace—Justification.

Trespass for false imprisonment. Plea not guilty by statute. The defendant, (a mofussil Magistrate and J. P. of Calcutta) issued a summons to one Gasper charged with assaulting G. M. The constable who served the summons reported that Gasper had committed a contempt of process and had refused to attend. The defendant then passed an order for the caption of Gasper, unless he appeared by a given day. The constable again made a similar report, and also made deposition before the junior Magistrate (to whom the case had been referred for trial) implicating both Gasper and his father. The junior Magistrate wrote an order for issuing a warrant, and accordingly upon that order a warrant was issued, directing the apprehension of both father and son, and signed by the defendant as Magistrate and J. P. Under it, the two Gaspers were taken. *Held*, that the defendant having signed the warrant as a Justice of the Peace must be taken to have issued it in that character, and that, as a Justice of the Peace, he had acted wholly without jurisdiction, and was liable. *Gasper v. Mytton*, 291

TRUSTEE.

Of marriage settlement, when he has a right to sue in trover for title deeds.

One Lazarus, (being at the time largely indebted to the defendants, Messrs. Willis and Earle,) by a post-nuptial set-

tlement conveyed to a trustee for the sole and separate use of his wife, certain property, the title deeds whereof subsequently got into the hands of the defendants, who refused to give them up, claiming a lien on them in respect of their advances to Lazarus. Six years after the conveyance was made, Lazarus took the benefit of the insolvent act. *Held*, that the legal estate, being in the trustee, he was entitled to maintain trover against the defendants; *held also*; that, whether the deed were fraudulent or not under the Stat. of Eliz. c. 5. the rights of creditors could not be discussed under the plea of "not possessed" in this form of action. *Smith v. Willis & another*, 159

UNION BANK.

See BANK.

BILLS AND NOTES.

VARIANCE.

See AMENDMENT at nisi prius.

PRACTICE at common law, 3.

WAGER.

(1) *Illegality of.*

A wager on the future prices of opium at the E. I. Company's public sales is illegal, on the ground that such a wager creates in one of the contracting parties an interest, tending to influence that party to endeavour to diminish the amount of revenue payable to the Company on the sale of that commodity. *Jomauram and another v. Hoormosjee Bawunjee Modee*. 1

(2) A wager on the future prices of opium at the E. I. Company public sales is illegal. *Ramlall Thakoorsydass, v. Soojamul Dhondmul*, Note, p. 16. *Dissentiente Perry*, J. Supreme Court Bombay.

(3) By the common Law of England in force in India, an action may be maintained on a wager, although the parties had no previous interest in the subject matter on which it is laid, if such wager be not against the interest or feelings of third persons, does not

lead to indecent evidence, and is not contrary to public policy. The mere circumstance, that a wager concerns the public revenue, or creates a temptation to do a wrong, will not render it illegal.

A wager on the average price which opium should fetch at the next Government sale at Calcutta, the plaintiffs having to pay the defendants the difference between such price and a sum named, per chest, and the defendants having to pay the difference between such price and the sum so named, if the price should be above that sum, is not an illegal wager, or contrary to public policy, though the proceeds of the opium sale at Calcutta formed part of the Government revenue.

The Stat. 8 & 9 Vict. ch. 109, amending the law relating to games and wagers does not extend to India. *Ramloll Thakoorsydass, v. Soojamul Dhondmul*. See appendix decided on appeal to the Privy Council, (1) 434 (a)

WILL.

Construction of—legacy—period of vesting—interest when chargeable.

Testator by his will, after giving the interest of Rs. 50,000 to his wife for life, bequeathed as follows. "At her death my two daughters shall receive the amount in equal shares. If they bear children they are to receive the same as their children become of age; and if they do not bear children they are not to receive the same, and Connolly and Gopaloll are to receive this amount. 2nd *Item*, my daughter Naboodoorga shall receive Rs. 25,000 and Sridooraga Rs. 25,000 in the whole 50,000—they are not to receive these sums now, but on sons having been born of them, they are to receive these sums; and they are not to receive the interest also now." Naboodoorga bore children, and her eldest son had attained majority; Sridooraga died childless—*Held*, that there was no evidence of intention by Testator to confer a benefit of survivorship; nor any ground for implying cross remainders; that the gifts of Rs. 50,000 in both clauses were distributable; and on fulfillment by one daughter of the condition attached, viz. production of a son, and his subsequently attaining majority,

the daughter so producing was entitled to her own share, although the other daughter might not have also fulfilled the condition. As Naboodoorga, therefore, had given birth to a son, who had attained majority, she was entitled to her moiety of each bequest: but as Sridoorga had died childless, the gift to her had lapsed, and fell into the residue.

Held also—that the mother's right became vested on her eldest son attaining majority: and that interest became payable upon the legacies from the period of their so vesting. *S. M. Naboodoorga Dabee v. Connyloll Tagore*, 61

(2) *What revocation of.*

Rajah K. Roy made a will, which was duly executed and attested. He afterwards, by inserting marginal notes and otherwise in his own hand, considerably altered this will, and then gave it so altered to his attorney, for the purpose of drawing up a new will. When completed, the Rajah took possession of this last document: what was done with it by him, or what became of it, was never afterwards discovered. On the 31st October, 1844, the Rajah committed suicide. A will with two codicils was then set up: the former was stated to have been drawn by him on the day previous to death, and the latter on the day of his death—The will only was attested and executed, viz. on the latter date. This last will differed in many material res-

pects from any of the preceding.—Proceedings were instituted on the Equity and Ecclesiastical sides of the Supreme Court—issues at law were directed—and the Court found the last mentioned will and codicils “not proven.” On further directions it was argued, that the first will stood revived. *Held*—that this depended on the testator's *intention*, which was a question of fact; and as the evidence was altogether deficient in that respect, there was no ground for presuming, from the supposed destruction at an unknown time of the second will, an intention to revive the first, especially while there was proof of an execution *in fact* of a materially differing will. *Sur-nomoye Dossee v. The E. I. Company*, 208

WRIT.

(1) *Of capias ad resp.*

See PLEADING at common law, I. 1.
PRACTICE at law, I. 1.

(2) *Of capias ad sat.*

See PLEADING at common law, III. 3.

(3) *Of Habeas corpus.*

See HABEAS CORPUS.
MANDAMUS.

(4) *Of Sequestration.*

See PRACTICE in equity, 7.
SEQUESTRATION.

